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Conflicts Theory in Conflict: A Systematic Appraisal of Traditional and Contemporary Theories

Winston P. Nagan

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CONFLICTS THEORY IN CONFLICT: A SYSTEMATIC APPRAISAL OF TRADITIONAL AND CONTEMPORARY THEORIES

WINSTON P. NAGAN*

Editor's Note:

This article explores the theoretical and practical bases of the Conflict of Laws, or as it is perhaps more generally called, Private International Law (PIL). Professor Nagan attempts to describe the jurisprudential assumptions of diverse theories of law in their relation to the theories of PIL. The central point of the article is that the new configurative jurisprudence of the policy-sciences is better equipped to provide a relevant, realistic and comprehensive theory about PIL, a theory that will enable rational decisionmakers and scholars to give effect to a more rational decision process for the law of multi-state (or group) problems. Moreover, the theory proposes to secure a greater appreciation of the potentials of PIL to make a positive contribution to the establishment and maintenance of a world public order committed to human rights and dignity.

PIL is viewed as a response to problems (claims) over which control is concurrently or sequentially shared by politically organized

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"groups" or "states." Professor Nagan seeks to show that because PIL is an outcome of the interaction of multiple groups and states, and is, in its most fundamental sense, charged with the allocation of law-making (prescriptive) and law-applying (applicative) competencies between relatively discrete bodies politic, PIL shares coordinate but important functions of law-making and law-applying with public international law in the transnational context. Indeed, Professor Nagan urges that private and public international law are, in reality, complementary and indispensable components of what he conceptualizes as a larger "world process of authoritative decision" which, though highly pluralistic and decentralized, nevertheless responds effectively to claims for the assertion of primary and secondary prescriptive and applicative competencies across group, state and national lines. Professor Nagan challenges the soundness of the prevailing orthodoxy owed to theories of dualism concerning the nature of public and private international law; he rejects the working assumption that these subjects "exist" on different conceptual planes and that PIL is undifferentiated from municipal law and the "sovereign's validating imprimatur."

Professor Nagan argues that because both private and public international law deal with prescriptive and applicative competencies across state and group lines, the criteria which had been used to evaluate past trends in theory about public international law may be readily adapted to appraise and evaluate past trends in theories about PIL; he suggests an alternative theoretical framework that he believes to be more consonant with the criteria of a comprehensive, realistic and goal-oriented theory about PIL.

Professor Nagan first seeks to delimit the problem concerning the adequacy of theorizing about PIL. This is accomplished by stressing the nature of the context from which problems requiring a PIL response emerge and by providing a simple illustration of the pitfalls of mechanistic formalism. Professor Nagan stresses the salience of power and its accommodation in the processes of prescription and application of law across state lines; he urges that since law-making in the transnational context is such a broad ranging, richly engaging task involving a wide variety of actors and institutions, its diversity cannot be ignored in PIL. The focus is, nevertheless, on those agencies of decision that have more directly influenced the development of doctrine in this area: the courts. Professor Nagan believes that when a court is confronted with a claim invoking the authoritative symbols of PIL, a decisional response involves a dual law-making function. The threshold law-making function requires the accommodation of power. Here the assurance that the foreign or transstate perspective will be a seri-

ous component of the decision process in turn assures the principle of reciprocal tolerances. The second function of law-making is designed to secure a result reasonably in accord with the expectations of the parties and the larger community. Hence, the second level of law-making should aspire to a reasonable allocation of prescriptive competence in the common interest. Professor Nagan suggests that a contemporary configurative jurisprudential perspective might serve as a better theoretical vehicle to realize that aspiration.

The article proceeds to set forth the core criteria associated with the configurative jurisprudence of the policy-sciences and evaluates the adequacy of past theories against these standards. Particular attention is given to the importance of the observational standpoint and the salience of distinguishing between theories of and theories about law. Professor Nagan criticizes the analytical perspective for denying the utility of this distinction and suggests that the ordinary language analysis of this school seeks to estop the generation of new concepts and forms of discourse seeking to make sense of changes about law in the real world. In short, Professor Nagan holds that the analytical views deny the utility of behavioral science in law. The disabilities of such a perspective for law generally, and PIL in particular, are acute as Professor Nagan contends that law cannot be scientifically viewed as a function of decisional behavior of actual decisionmakers except through the lens of the "observer." Moreover, to preclude a concern for decision-making from any theory of or about law that aspires to realism is, according to Professor Nagan, hardly sensible.

In his critique of modern theories, Professor Nagan seeks to shed light on the jurisprudential basis of the Legal Process paradigm. He does this by comparing and contrasting the core differences between this perspective and that of the policy-sciences focusing specifically on the former's assumptions concerning the epistemological basis of the nature of inquiry, objectivity and normative standards. An appraisal of the shortfalls of past theories follows and the outlines for a configurative theory about PIL are suggested.

The final section sets forth the social process context of PIL through use of a phase analysis of participants, perspectives, bases of power, situations, conditions and outcomes—the traditional approach of the policy-sciences. Professor Nagan suggests that the adoption of a phase analysis to delimit both the general and specific factual background of a particular problem is an important aspect of a comprehensive theory about PIL. Implementing this suggestion, Professor Nagan describes the outcomes of the social process context in terms of claims and decision; he outlines the general contours of the process

of claim and the process of decision that respond to claims in this field. In particular, it is noted that the model of decision seeks to underscore the idea that decision involves choice; disciplined decision-making, if it aspires to rationality, must encompass several interrelated decision functions, some of which may be more central to the nature of the PIL problem than others in their realization.

The article also deals with the clarification of the basic policies of PIL and includes an effort to apply principles of content and procedure, as developed in the policy-sciences, in an effort to relate particular problems to general abstract norms, such as human rights prescriptions. It is suggested that these tools may be useful in resolving PIL problems by enabling decisionmakers to systematically connect specific problems to preferred normative standards associated with international justice and human rights perspectives.

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I. INTRODUCTION

Private International Law [PIL],¹ or Conflict of Laws, as it is generally known in common law jurisdictions, is a difficult subject. Practical problems of the most commonplace variety can be transformed into a complex configuration of difficult issues simply by the addition of what traditional PIL scholars call a "foreign element."² Although find-

1. The term "Private International Law" was coined in 1834 by Justice Story in his pioneering *Commentaries on the Conflict of Laws*. The phrase "Conflict of Laws" originates from a seventeenth century tract by Ulrichus Huber, *De Conflictu Legum Diversarum in Diversis Imperiis*. A. KUHN, *COMPARATIVE COMMENTARIES ON PRIVATE INTERNATIONAL LAW* 1 n.1 (1937); A. NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 7 (1943). Story used the term PIL to denominate the law governing the "very complicated private relations and rights" which necessarily arise between the citizens of a nation which is composed of distinct "and in some respects independent states." J. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* 9-10 (8th ed. 1883 & photo. reprint 1972) (1st ed. Boston 1834). Since this law "is chiefly seen and felt in its application to the common business of private persons," *id.*, it is to be distinguished from public international law which traditionally governs the relations between sovereign nations. See, e.g., P. NORTH, CHESHIRE AND NORTH'S *PRIVATE INTERNATIONAL LAW* 12-13 (10th ed. 1979). Beale suggested that "[i]n the phrase 'private international law' the word [international] means having extra-national elements, as in the phrase 'international society.'" J. BEALE, *SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS* 14-15 (1935). Other alternative phrases include: "the international treatment of private persons," "local limitations of the rules of law," "relations of the co-ordinate sources of law," and "extra-territorial recognition of rights." See L. BAR, *THE THEORY AND PRACTICE OF PRIVATE INTERNATIONAL LAW* 7-8 (G. Gillespie trans. 2d ed. 1892).

The phrase "Conflict of Laws" has been criticized as "misleading" since "the very purpose of private international law is to avoid conflicts of law." P. NORTH, *supra*, at 12. If an English court decides that the assignment must be governed by French law, it does not do so because English law has been worsted in a conflict with the law of France, but because it is the law of England, albeit another part of the law of England, i.e. private international law, that in the particular circumstances it is expedient to refer to French law.

Id. A genuine conflict arises when "two territorial systems, differing in themselves, both seek to regulate the same matter." *Id.* For example, English law and Greek law might each claim to govern the bequest of a Greek subject dying while domiciled in England. *Id.* at 12-13.

2. See, e.g., M. WOLF, *PRIVATE INTERNATIONAL LAW* (2d ed. 1950). This foreign or "extra-national" element may consist of an event which occurs in a foreign jurisdiction. See, e.g., *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (New York residents involved in automobile accident in Ontario, Canada). A foreign element may also be the relationship between a foreign jurisdiction and one of the parties to the action. See, e.g., *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954) (England, as the jurisdiction of the marital domicile and residence of the wife and children, has the most significant relationship to a separation agreement contested in an action brought in New York. English law therefore governs the action). The foreign element may be the relationship between a foreign jurisdiction and some object involved in the action. See, e.g., *In re Schneider's Estate*, 198 Misc. 1017, 96 N.Y.S.2d 652 (Sur. Ct.), *aff'd on rehear-*

ing solutions to problems of this complexity requires that both scholars³ and practitioners⁴ use a broad range of skills, PIL is far from eso-

ing, 100 N.Y.S.2d 371 (1950) (action involving disposition of real property located in Switzerland by testamentary act of naturalized American citizen of Swiss origin who died in the United States).

3. The contributions that scholars have made to this field warrant its being designated scholar dominated. The glossators of the eleventh century, who added explanatory notes or *glossae* to the text of the *Corpus Juris*, had done much for the revival of Roman law. It was, however, "the post-glossators or commentators of the thirteenth century, the jurists attached to the law schools of Bologna, Padua, Perugia, and Pavia, who made the first serious attempt to apply a scientific mode of reasoning to the reconciliation of conflicting laws . . . [and thus] wrote upon what we should now term private international law" P. NORTH, *supra* note 1, at 19. There are many great contributions from this era. See, e.g., BARTOLUS, BARTOLUS ON THE CONFLICT OF LAWS (J. Beale trans. 1914 & photo. reprint 1979); Bartolus, *Bartoli A Saxoferrato Commentariae in Codicem*, in F. VON SAVIGNY, PRIVATE INTERNATIONAL LAW AND THE RETROSPECTIVE OPERATION OF STATUTES app. I (W. Guthrie trans. 2d ed. 1880 & photo. reprint 1972) (1st ed. London 1869); Huber, *Ulrici Huberi de Conflictu Legum in Diversis Imperiis*, in F. VON SAVIGNY, *supra*, at app. IV; Lorenzen, *Huber's De Conflictu Legum*, 13 NW. U.L. REV. 375 (1918); Voet, *Pauli Voetii de Statutis Eorumque Concursu*, in F. VON SAVIGNY, *supra*, at app. III; J. STORY, *supra* note 1.

Modern theorists who by means of their scholarship have shaped conflict of laws include: J. BEALE, *supra* note 1; D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965); W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942); B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW (1967 & Special Part with E. Jayme 1973); A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS (1962); H. GOODRICH, HANDBOOK ON THE CONFLICT OF LAWS (4th ed. 1964); R. LEFLAR, AMERICAN CONFLICTS LAW (3d ed. 1977); E. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS (1947); E. RABEL, CONFLICT OF LAWS (2d ed. 1958); RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971); A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS (1965); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (2d ed. 1980); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1927). Other modern American theorists of note include: Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice of Law Process*, 46 TEX. L. REV. 141 (1967); Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279 (1972).

Some of the leading foreign writers include: H. BATTIFOL, DROIT INTERNATIONAL PRIVÉ (6th ed. 1974-76); I. BAXTER, ESSAYS ON PRIVATE LAW (1966); A. DICEY & J. MORRIS, DICEY AND MORRIS ON THE CONFLICT OF LAWS (J. Morris 10th ed. 1980); R. GRAVESON, CONFLICT OF LAWS (7th ed. 1974); O. KAHN-FREUND, THE GROWTH OF INTERNATIONALISM IN ENGLISH PRIVATE INTERNATIONAL LAW (1960); J. MORRIS, THE CONFLICT OF LAWS (2d ed. 1980); J. NIBAUM, TRAITÉ DE DROIT INTERNATIONAL PRIVÉ FRANÇAIS (2d ed. 1947-51); P. NORTH, *supra* note 1; A. NUSSBAUM, *supra* note 1; P. NYGH, CONFLICT OF LAWS IN AUSTRALIA (3d ed. 1976); C. SCHMITTHOFF, ENGLISH CONFLICT OF LAWS (3d ed. 1954); A. SHAPIRA, THE INTEREST APPROACH TO CHOICE OF LAW (1970); E. SYKES, A TEXTBOOK ON THE AUSTRALIAN CONFLICT OF LAWS (1972); F. VON SAVIGNY, PRIVATE INTERNATIONAL LAW AND THE RETROSPECTIVE OPERATION OF STATUTES (W. Guthrie trans. 2d ed. 1880 & photo. reprint 1972) (1st ed. London 1869).

4. Distinguished jurists, past and present, who have sought to develop in a more sophisticated manner the theory of PIL through the cases include Story, Traynor, Fuld,

teric. On the contrary, the rules, policies and practices of international law, whether private or public, perform the historic function of all law; they seek to secure a myth and a set of operational indices whereby the valued things in transnational life are allocated. PIL deals, at least in form, with allocations of values relating to individual justice among parties who are mainly private rather than public.⁵ It is an outcome of

Kenison, and Keating. See, e.g., Justice Traynor's insightful analysis in Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959). See also *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966) (Kenison, J.); *Johnson v. Johnson*, 107 N.H. 30, 216 A.2d 781 (1966) (Kenison, J.); *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969) (Keating, J.); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (Fuld, J.).

5. In functional terms, the concepts "public" and "private" are overly dichotomized. The distinction omits from the focus of inquiry, in both qualitative and quantitative terms, important problems of international concern. Of course, these concepts classify doctrines rather than problems. As such, they fall prey to all the criticisms that modern jurisprudence has directed toward abstracted formalism.

PIL is greatly concerned with, among other things, the control and regulation of the global economy. Differentiating between distinctly public and distinctly private roles in the world economic order would appear to be astigmatic in the extreme. The following list, comparing the annual profits of large United States multinational corporations with the gross national product of nations, shows the relative economic weight private multinational corporations, such as American Telephone & Telegraph (A.T.&T.) and International Business Machines (I.B.M.), may exercise compared to public actor states: A.T.&T., 6,888; Sudan, 6,458; Burma, 6,416; Ghana, 6,084; Vietnam, 6,000; Exxon, 5,567; Qatar, 5,508; Uruguay, 4,990; Sri Lanka, 4,803; Kenya, 4,597; Zaire, 4,140; Ethiopia, 3,846; Zimbabwe, 3,784; Bolivia, 3,704; Jamaica, 3,631; Tanzania, 3,532; Uganda, 3,505; I.B.M., 3,308; Luxembourg, 3,221; Panama, 3,212; Afghanistan, 3,115; Zambia, 2,654; Jordan, 2,592; Gabon, 2,470; Mobil, 2,433; Standard Oil of California, 2,380; Texaco, 2,310; Albania, 2,160; Standard Oil of Indiana, 1,922; Shell Oil, 1,701; Atlantic Richfield, 1,671; General Electric, 1,652; Iceland, 1,600; E.I. du Pont de Nemours, 1,401; Mongolia, 1,324; Gulf Oil, 1,231; Ford Motor, 1,060. See THE HAMMOND ALMANAC 199, 201 (M. Bacheller ed. 1983) (figures are in millions of United States dollars). See also Meeker, *Toward a Fade-In Joint Venture Process*, PAPERS OF THE CAPITAL MARKETS DEVELOPMENT PROGRAM 86-92 (June 1974).

The international landscape of economic organizations is in great flux, not only as a consequence of the emergence of national multinationals such as the Ford Motor Company and the Mitsubishi Group, but also of "international" multinationals such as Air Afrique, a multiple nationality entity created by treaty which is under unified management and is headquartered in the Ivory Coast.

The future of international business enterprises appears to be flowing in the direction of even larger economic aggregates outside the framework of the state. An indication of this trend is the EEC Commission's draft statute for a European Company, which was presented to the Council of Ministers in 1970. The European Company (*Societas Europaea*, S.E.) is envisioned as the first supranational enterprise that would consciously ignore national boundaries. The basic objective of an S.E. will be to give medium and smaller size corporations access to international economic markets. See generally THE HARMONIZATION OF EUROPEAN COMPANY LAW (C. Schmitthoff ed. 1973); Cheris & Fischer, *The European Company: Its Promise and Problems*, 6 STAN. J. INT'L STUD. 113, 127-30

the world social process in which participants interact and value exchanges take place. In the contemporary system of international relations, outcomes result from a social process centered around the concept of the "group," regardless of the complexity with which that term may be defined.⁶ Component members of the international community interact with one another, not only within "groups," but also across "group" lines.

The key consequence of the present system is an incredibly voluminous flow of capital, people, goods, services, commodities, technologies, skills, armaments, and exchanges covering every demanded

(1971); Mann, *The European Company*, 19 INT'L & COMP. L.Q. 468 (1970).

The prospect of an enlarged version of the S.E., the "World Company" or "Stateless (Cosmo Corp.) World Company" is another projected development, although it is conceded that such corporations already exist de facto in the field of global communications. See generally R. TINDALL, *MULTINATIONAL ENTERPRISES* (1975).

The legal structure of multinational enterprises suggests the need for urgent development of the techniques and processes associated with private international law. For example, complex problems may emerge because the structure of a multinational may be predicated upon contract-type linkages, or linkages predicated on cross-share holdings, or within the framework of a jointly-owned holding company, or a jointly-owned operating company, or through an equalization agreement with common directors and a unified management, or several other complex legal economic structures.

6. See generally J. FALKENBURG, *KIN AND TOTEM: GROUP RELATIONS OF AUSTRALIAN ABORIGINES IN THE PORT KEATS DISTRICT* (1962); C. FORD, *A COMPARATIVE STUDY OF HUMAN REPRODUCTION* (Yale U. Publications in Anthropology No. 32, 1945); R. FORTUNE, *OMAHA SECRET SOCIETIES* (Colum. U. Contributions to Anthropology vol. 14, 1932); N. GIST, *SECRET SOCIETIES: A CULTURAL STUDY OF FRATERNALISM IN THE UNITED STATES* (U. Mo. Stud. vol. 15, 1940); L. TIGER, *MEN IN GROUPS* (1969); Evan, *Dimensions of Participation in Voluntary Associations*, 36 SOC. FORCES 148 (1957); Hertz, *Rise and Demise of the Territorial State*, 9 WORLD POL. 473 (1957); Jourard, *Privacy: The Psychological Need*, 9 NEW SOC'Y 757 (1967); Kaplan, *Balance of Power, Bipolarity and Other Models of International Systems*, 51 AM. POL. SCI. REV. 684 (1957); Komorovsky, *The Voluntary Associations of Urban Dwellers*, 11 AM. SOC. REV. 686 (1946); Landau, *Prolegomena to a Study of Secret Societies in Modern Egypt*, 1 MIDDLE E. STUD. 135 (1965); Latham, *The Group Basis of Politics: Notes for a Theory*, 46 AM. POL. SCI. REV. 376 (1952); Little, *The Role of the Secret Society in Cultural Specialization*, 51 AM. ANTHROPOLOGIST 199 (1949); Little, *The Role of Voluntary Associations in West African Urbanization*, 59 AM. ANTHROPOLOGIST 579 (1957); McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L. L. 1 (1959); Reynolds, *Open Groups in Hominid Evolution*, 1 MAN 441 (1966); Ross, *Control and Leadership in Women's Groups: An Analysis of Philanthropic Money-Raising Activity*, 37 SOC. FORCES 124 (1958); Scott, *Membership and Participation in Voluntary Associations*, 22 AM. SOC. REV. 315 (1957); Smith, *A Psychological Model of Individual Participation in Formal Voluntary Organizations: Application to Some Chilean Data*, 72 AM. J. SOC. 249 (1966); Sommer, *Studies in Personal Space*, 22 SOCIOMETRY 247 (1959); Wedgwood, *The Nature and Functions of Secret Societies*, 1 OCEANIA 129 (1930); Zimmer & Hawley, *The Significance of Membership in Associations*, 65 AM. J. SOC. 196 (1959).

value⁷ by members of groups comprising the world community. This

7. The problems which can arise with respect to domestic relations in both the federal and international contexts are numerous. During 1974, for example, 2,229,667 marriages were performed in the United States. III U.S. DEPT OF HEALTH & HUMAN SERVICES, VITAL STATISTICS OF THE UNITED STATES, MARRIAGE AND DIVORCE I-5, Table 1-1 (1974). Of this total, 279,000 involved at least one individual who was not a resident of the state of celebration. A total of 143,486 marriages were performed in that same year in which neither party was a resident of the state of celebration. *Id.* at I-34, Table 1-33.

Problems of validity and capacity are inherent in a transstate marriage. For example, what will be the result of a marriage between two first cousins in a state which allows such a marriage if the couple returns to their state of domicile where the marriage is considered incestuous? Likewise, what is the probable outcome of a marriage outside the domicile when one or both parties are not of legal age to marry within the domicile?

With respect to dissolution of marriages, during 1974, there were 977,000 divorces, *id.* at 2-6, Table 2-2, and 11,080 annulments, *id.* at 2-7, Table 2-3, granted in the United States. In a survey of thirty states, representing 571,794 or 58.5% of all divorces, it was found that 190,059 or 33.2% of the divorces occurred in states outside the state where the marriage was originally performed. *Id.* at 2-11, Table 2-11. Although familial migration may account for a large percentage of this statistic, it may also be presumed that many of these domiciliary changes were for the sole purpose of obtaining a divorce. The transstate problems created by divorce are several. For example, what law governs when one spouse moves from a community property state to one adhering to common law divorce? Will the common law state accede to the law of the marital domicile in the making of economic adjustments or apply its own law?

The problems of transstate divorce have a special significance in the area of child custody. Of the estimated 1,099,000 children involved in divorce proceedings in the United States in 1974, *id.* at 2-10, Table 2-9, it may be assumed that a reasonable number were involved in situations where they and the custodial parent moved to another state or the non-custodial parent moved out of state. The problems of custody and support which are bound to arise in such a situation will necessarily involve the laws of more than one state. As an example of these problems, what will be the result of a contractual agreement for child support which is valid and binding in one state but inherently unconscionable in another? Or, what will be the outcome when a non-custodial parent abducts his or her child from a state having a strong state policy against such unauthorized activities and transports the child to a state having no such policy?

Regarding the area of education, in 1975 there were 11,179,610 students in the United States enrolled in colleges on a full or part time basis. Of this total, 1,892,786 were residing outside of their state of domicile. NATIONAL CENTER FOR EDUCATIONAL STATISTICS, DIGEST OF EDUCATIONAL STATISTICS 87 (1974). In this context, it is inevitable that conflicts between the laws of two or more states will arise. The potential for conflicts within the framework of torts, contracts and family law is awesome. The likelihood of conflicts problems becomes more pronounced in light of the number of foreign nationals attending United States colleges and universities. During the 1971-72 school year, 146,097 foreign students were enrolled in American institutions of higher education. *Id.* at 143. During this same period, 34,218 American students were studying abroad along with 6,552 faculty and administrative personnel. *Id.* at 142.

International business transactions involving the United States give but an idea of the magnitude of private international commercial relationships existing throughout the world. For example, in 1976 the total value of United States assets abroad was 347.2 billion dollars. Of this total, 282.4 billion were private assets. During the same period,

process of value-exchange has brought to the fore at least three fundamental characteristics of contemporary world order: interdependence, interdetermination, and interstimulation.

Consider first the fact of interdependence.⁸ This fact is under-

the total value of foreign assets located in the United States was 159.1 billion dollars, of which 30.8 billion dollars was the result of direct investment. BUREAU OF CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES 1981, at 833, No. 1495. The direct foreign investment of other nations in 1978 included, in millions of United States dollars: Canada, 1,269.4; France, 228.1; United Kingdom, 1,470.2; Saudi Arabia, 130.3; Israel, 5.5; Australia, 51.4; India, 7.5; Mexico, 9.6; Panama, 8.5; and South Africa, 42.3. INDUS. & TRADE ADMIN., U.S. DEP'T COMM. NEWS (Aug. 23, 1979).

The value of the international trade of various nations of the world further demonstrates the staggering amount of transstate economic relations. The values of the exports and imports in 1976, in millions of United States dollars, for the following states were: Algeria, 5,061 exports and 5,852 imports; Belgium-Luxembourg, 32,846 exports and 35,354 imports; Brazil, 10,126 exports and 13,622 imports; West Germany, 101,846 exports and 87,570 imports; Iran, 23,525 exports and 13,809 imports; Japan, 67,225 exports and 64,799 imports; Saudi Arabia, 36,086 exports and 6,886 imports; United States, 113,378 exports and 128,872 imports; USSR, 37,169 exports and 38,151 imports. INFORMATION PLEASE ALMANAC 102 (T. Dolmatch 32d ed. 1978).

The activities of multinational corporations contribute greatly to this flow of transnational trade and investment. For example, in 1978 a leading Taiwan corporation had the following foreign investments, in thousands of United States dollars: in Japan, 102.8; in the United States, 1,353.0; in Hong Kong, 108.3; in Singapore, 1,143.5; and 100.0 in the Philippines. W. Ting & C. Schive, *Direct Investment and Technology Transfer from Taiwan*, in MULTINATIONALS FROM DEVELOPING COUNTRIES 101, 109 (K. Kumar & M. McLeod ed. 1981).

In the field of transportation, United States carriers collected 937 million dollars from the 4.456 million foreign travelers who came to the United States during 1976. STATISTICAL ABSTRACTS, *supra*, at 239, No. 413. During this same period 6.897 million Americans traveled to foreign countries. They paid 1.444 billion to United States carriers for transportation. The total of all United States expenditures in foreign countries was 10.868 billion during 1976. *Id.* at 240. In 1976, 447.3 million dollars in revenues was received by the United States Postal Service for transporting international mail. These revenues were generated on the 933 million pieces of international mail handled. *Id.* at 558. During 1976, 75.8 million overseas phone calls were placed generating income of 664 million dollars. *Id.* at 560. 24 million telegrams were sent overseas generating 238 million in income. *Id.*

One can only speculate as to the volume of private international litigation produced by these extensive commercial relations. Only upon consideration of the broad spectrum of activities involved in these relationships can the diversity and enigmas of such litigation be fully appreciated. To name only a few: what law is applied to a breach of contract between a foreign and domestic party? Under what law do foreign assets in this country pass upon the owner's death? What law applies when an American is injured aboard a foreign cruise ship? The decisional problems facing the courts in such disputes are apparent.

8. For a discussion of interdependence, see M. McDUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980); see generally H. LASSWELL, WORLD REVOLUTIONARY ELITES (1965).

scored by the commonplace observation that our security, well-being and capacity for attaining a just society are intimately tied up with the security, well-being and ability to deliver justice not only to ourselves, but to others as well. It is typically observed, for example, that the failure of a wheat crop in the Soviet Union might directly or indirectly affect the price of bread for the average consumer in the United States.

The second characteristic is interdetermination.⁹ Here again, it is an obvious datum that the decisions we make, purposely or otherwise, may determine the future not only of ourselves but of others as well. Likewise, their decisions may determine the kind of future world order we might anticipate. For example, a decision to increase the level of arms production in the Soviet Union may determine what percentage of the United States' Gross National Product should be devoted to security, rather than to expenditures concerned with domestic living standards. To the extent global security systems demonstrate an aggregate security commitment that exceeds commitment of limited resources to human and social development, the global system may be but a reflection of complex decisional patterns that determine the scope and quality of both human security and justice.

The final characteristic highlighted by our contemporary system of world order is interstimulation. The term interstimulation signifies the processes that serve the generation, compression and communication of creative intelligence for the solution of common problems in a pluralistic world. As never before, world society is being conditioned by change that occurs in many contexts. The predominant elements of change have been triggered by technological advances, particularly in the areas of international communication.¹⁰ The collective capacity of the inter-

9. For a discussion of interdetermination, see H. LASSWELL, *supra* note 8.

10. Examples of technological advances range from the direct dial telephone and the television to the telex system. See Angell, *International Community and World Society*, in *THE WORLD COMMUNITY* 145 (Q. Wright ed. 1947). See also Resolution on an International Programme for the Development of Communication, UNESCO, Records of the General Conference, 21st Sess., vol. 1, UNESCO Resolutions, Resolution 4.21 (1980), reprinted in 20 I.L.M. 451 (1981).

For a study that connects microlevels of communication with law and public order, see W.M. REISMAN, *LOOKING, STARING AND GLARING: MICRO-NORMATIVE SYSTEMS AND PUBLIC ORDER* (Sept. 8, 1980) (unpublished draft). See also Convention for the Protection of Individuals With Regard to Automatic Processing of Personal Data, Jan. 28, 1981, Europ. T.S. No. 108, reprinted in 20 I.L.M. 317 (1981); Council Recommendation Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, OECD (523rd mtg.), OECD Doc. C/80-58 (1980), reprinted in 20 I.L.M. 422 (1981); Fishman, *Introduction to Transborder Data Flows*, 16 *STAN. J. INT'L L.* 1 (1980). These international advances are applied to new international problems. As early as 1974, the need to protect personal privacy was recognized on the international level. Upon a suggestion by the Secretary General of the United Nations, advanced countries

national community to respond to crises and problems has been enhanced by the rapidity with which crises and other problems are effectively communicated to the world as a whole. The actual ability of the international community to respond decisively to these issues has been correspondingly heightened. For example, scientists from temperate regions have played a decisive role in the world food crisis by developing new food strains in tropical regions. Clearly, the influence of technological advance has the potential for greatly homogenizing functions of human life without necessarily destroying the rich cultural diversity of the global society.¹¹

International law, as an outcome of the world social process, has concerned itself with the allocation of political¹² and economic power,¹³

adopted minimum standards of privacy protection. *Id.* at 11.

11. See generally Mead, *World Culture*, in *THE WORLD COMMUNITY* 47 (Q. Wright ed. 1947).

12. See generally R. FALK, *A STUDY OF FUTURE WORLDS* (1975); M. KAPLAN, *SYSTEM AND PROCESS IN INTERNATIONAL POLITICS* (1957); M. KAPLAN & N. KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* (1961); W. SCHIFFER, *THE LEGAL COMMUNITY OF MANKIND* (1954); *THE FUTURE OF INTERNATIONAL LEGAL ORDER: TRENDS AND PATTERNS* (C. Black & R. Falk ed. 1969); Lasswell, *The Interrelation of World Organization and Society*, 55 *YALE L.J.* 870 (1946); McDougal, *International Law and the Future*, 50 *MISS. L.J.* 259 (1970); McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, 19 *J. LEGAL EDUC.* 253 (1969); Reisman, *Private Armies in a Global War System*, 14 *VA. J. INT'L L.* 22 (1973).

13. One of the great instruments of contemporary economic order is the multinational corporation. The capacity of multinationals to move capital, technology, managerial skills, enterprise, and information serves to increasingly homogenize the production of goods and services across state and national lines. The fundamental problem posed for the world economy is what principles of content and procedure should control and regulate the production and distribution of resources on a global basis. The world economy is highly decentralized, remarkably pluralistic, and is sustained by strongly held ideologies and doctrines about the precise relationship between the private and the public control over the means of production of all economically relevant goods and services. The three main economic "blocs" that characterize the diverse nature of the world economy are: (1) the developed, market oriented Western economies; (2) the centrally planned socialist economies of the eastern bloc; and (3) the economies of the underdeveloped and developing world. In such a diverse world economy, the problems of rational allocation of global resources in the common interest of mankind are substantial, if not intractable. The importance of a field like PIL for structuring economic institutions, processes, and expectations for an increasingly interdependent world cannot be gainsaid. See *Multinational Corporations in World Development*, U.N. Doc. ST/ECA/190, U.N. Sales No. E.73. II.A.11 (1973); *Multinational Corporations: Hearings Before the Subcommittee on International Trade of the Senate Committee on Finance*, 93rd Cong., 1st Sess. (1973). SENATE COMMITTEE ON FINANCE, 93RD CONG., 1ST SESS., *IMPLICATIONS OF MULTINATIONAL FIRMS FOR WORLD TRADE AND INVESTMENT AND FOR U.S. TRADE AND LABOR* (Comm. Print 1973). United Nations Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974).

Other dimensions of the international economic order, especially those that encom-

with the allocation of the common resources of the earth-space community, and in a more explicit way today,¹⁴ with allocations relating to individual justice (human rights). A central and pervasive question lawyers have been concerned with has been the identification and man-

pass conditions of underdevelopment, suggest an important role for PIL in the near future. The literature on the international economic order and the North-South complexities is vast. See generally M. BEDJAOUI, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* (1979); O. DE RIVERO, *THE NEW ECONOMIC ORDER AND INTERNATIONAL DEVELOPMENT LAW* (1980); J. INGRAM, *INTERNATIONAL ECONOMIC PROBLEMS* (3d ed. 1978); P. JESUP, *TRANSNATIONAL LAW* (1956); A. KOUL, *THE LEGAL FRAMEWORK OF UNCTAD IN WORLD TRADE* (1977); R. MEAGHER, *AN INTERNATIONAL REDISTRIBUTION OF WEALTH AND POWER* (1979); J. TINBERGEN, *SHAPING THE WORLD ECONOMY*, (1962); Agrawala, *The Emerging International Economic Order*, 17 *INDIAN J. INT'L L.* 261 (1977); Bautista, *The New International Economic Order and Christian Charity*, 25 *CATH. LAW.* 171 (1980); Blair, *Commentaries*, 16 *VA. J. INT'L L.* 348 (1976); Borgese, *The New International Economic Order and the Law of the Sea*, 14 *SAN DIEGO L. REV.* 584 (1977); Brian, *International Law and the Developing Countries: The ABA Workshops of 1977*, 12 *INT'L LAW.* 265 (1978); Brower, *The Charter of Economic Rights and Duties of States and the American Constitutional Tradition*, 10 *INT'L LAW.* 701 (1976); CHALLENGES TO A LIBERAL INTERNATIONAL ECONOMIC ORDER (R. Amacher, G. Haberler & T. Willett ed. 1979); Dawson, *The Role of the Private Banker in the New International Economic Order*, 16 *VA. J. INT'L L.* 298 (1976); ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER (R. Lillich ed. 1976); Fatourod, *The International Law of the NIEO: Problems and Challenges for the U.S.*, 17 *WILLIAMETTE L.J.* 93 (1980); Ferguson, *The New International Economic Order*, 3 *U. ILL. L.F.* 693 (1980); THE GLOBAL PARTNERSHIP (R. Gardner & M. Millikan ed. 1968); Haight, *The International Economic Order and the Chapter of Economic Rights and Duties of States*, 9 *INT'L LAW.* 597 (1975); Khan, *The Normative Character of the NIEO: The Framework of Inquiry*, 18 *INDIAN J. INT'L L.* 294 (1978); LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER (K. Hossain ed. 1980); Lillich, *Commentaries*, 16 *VA. J. INT'L L.* 291 (1976); THE OBJECTIVES OF THE NEW INTERNATIONAL ECONOMIC ORDER (E. Laszio ed. 1978); A REORDERED WORLD: EMERGING INTERNATIONAL ECONOMIC PROBLEMS (R. Cooper ed. 1973); Richard, *The United Nations Seventh Special Session: Proposals for a New World Economic Order*, 9 *VAND. J. TRANSNAT'L L.* 601 (1976); Rozental, *The Charter of Economic Rights and Duties of States and the New International Economic Order*, 16 *VA. J. INT'L L.* 309 (1976); Ryan, *Towards a New International Economic Order*, 9 *U. QUEENS. L.J.* 135 (1976); Schaehter, *The Evolving International Law of Development*, 15 *COLUM. J. TRANSNAT'L L.* 1 (1976); Shukla, *New International Economic Order*, 18 *INDIAN J. INT'L L.* 290 (1978); Simmonds, *The Home Convention and the New International Economic Order*, 13 *COMMON MKT. L. REV.* 315 (1976); THE UNITED STATES, CANADA, AND THE NEW INTERNATIONAL ECONOMIC ORDER (E. Laszlo & J. Kurtzman ed., Pergamon Policy Studies No. 51, 1979); Van Themaat, *Some Basic Legal Issues of a New International Economic Order: A Western Point of View*, 24 *NETH. INT'L L. REV.* 509 (1977); Vanzant, *The Charter of Economic Rights and Duties of States: A Solution to the Development and Problem*, 4 *GA. J. INT'L & COMP. L.* 446 (1974); White, *New International Economic Order*, 16 *VA. J. INT'L L.* 323 (1976); White, *New International Economic Order*, 24 *INT'L & COMP. L.Q.* 542 (1975); Zaphirou, *An International Code of Conduct on Transfers of Technology*, 26 *INT'L & COMP. L.Q.* 210 (1977).

14. See generally M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 8.

agement of central structures and processes shaped by the social, economic, and political conditions of world society. It has traditionally been the lawyer's task to shape those processes in ways that secure outcomes most compatible with maintaining the conditions of peace and security, while at the same time stimulating the generation of ideas and practices that promote traditional and emergent ideals of universal justice.

Much doctrinal effort has been spent on the theoretical and practical bases of PIL.¹⁵ Past theories, however, have been culled from studies viewing PIL as an outcome separate and distinct from public international law. From a functional point of view, the distinction between public and private international law would appear to be at best artificial, as both public and private international law ultimately deal with the myth and practice of responding to claims for the allocation of the good as well as the undesirable things in the world social processes. This article urges the perspective of recognizing that public and private international law are in reality complementary and indispensable components of a larger and more inclusive conception of world public order.¹⁶ When public and private international law are viewed as coor-

15. See *supra* notes 3-4.

16. For an effort to bypass the sterile dualism of inherited theories about public and private international law, see Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 TEMP. L.Q. 295 (1959). See also Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087 (1956); McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 YALE L.J. 915 (1952); McDougal, *International Law, Power and Policy*, 82 RECUEIL DES COURS 137 (1953). Several leading casebooks sustain a similar perspective. See, e.g., M. McDougal & W.M. Reisman, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY* (1981); H. Steiner & D. Vagts, *TRANSNATIONAL LEGAL PROBLEMS* (1976); J. Sweeney, C. Oliver & N. Leech, *THE INTERNATIONAL LEGAL SYSTEM* (2d ed. 1981); B. Weston, R. Falk & A. D'Amato, *INTERNATIONAL LAW AND WORLD ORDER* (1980).

It should be noted that in the sphere of economic relations, the well known rule that local remedies must be exhausted means that a vast number of problems lapse over into PIL. See *Greece v. Bulgaria*, 3 R. Int'l Arb. Awards 1389, 1419 (1933); *Claim of Finnish Shippers (Finland v. United Kingdom)*, 3 R. Int'l Arb. Awards 1479 (1934). See also F. Dunn, *THE PROTECTION OF NATIONALS* 156-58 (1932); D. Greig, *INTERNATIONAL LAW* 583-89 (2d ed. 1976); L. Sohn & R. Baxter, *CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS*, 55 AM. J. INT'L L. 545, 577 (1961). Art. 19 reads as follows:

Article 19. When Local Remedies Considered Exhausted

1. Local remedies shall be considered as exhausted for the purposes of this Convention if the claimant has employed all administrative, arbitral, or judicial remedies which were made available to him by the respondent State, without obtaining the full redress to which he is entitled under the Convention.

dinate processes of law-making in the international legal arena, that broad conception of the law reflects all of the processes concerned with authoritative and controlling decisions in the largely decentralized and heterogeneous global system. A distinction between public and private international law is reflected in scholarly writings where books are clearly designated as either public or private international law.¹⁷ The Restatements of the ALI in the United States clearly reflect a further acceptance of the distinction. Thus, the *Restatement of Conflict of Laws*¹⁸ appears to be distinct from the *Restatement of Foreign Relations Law*.¹⁹ If one views what is called public and what is called private international law as coordinate and complementary responses to problems that are factually comparable and involve coequivalent policy dimensions, one will have increased his or her understanding of how transstate law is made and applied and how it might be managed so

2. Local remedies shall be considered as not available for the purposes of this Convention:

- (a) if no remedy exists through which substantial recovery could be obtained;
- (b) if the remedies are in fact foreclosed by an act or omission attributable to the State; or
- (c) if only excessively slow remedies are available or justice is unreasonably delayed.

Id.

The law of state succession also encompasses the problem of international obligations, particularly economic obligations that have PIL overtones. See D. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* (1976). The principles governing the treatment of alien property are still another area of interpretation of public and private international economic law. See R. LILLICH & B. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* (1975); *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* §§ 165-66, commentary at 502-09 (1965); Weston, "Constructive Takings" Under International Law: A Modest Foray into the Problem of "Creeping Expropriation," 16 VA. J. INT'L L. 103 (1975).

17. The literature regarding PIL is abundant. Many texts introduce PIL by comparing it to public international law. Minor says that PIL can be distinguished from public international law first as to the persons on whom it operates, second as to the transactions to which it relates and third as to the remedies applied. R. MINOR, *infra* note 63, at 2. Castel speaks of the need for rules that

co-ordinate the incidence of the legal systems involved in cases containing relevant foreign elements. Rules which deal with the rights and obligations of states and international organizations *inter se* are called public international law rules. On the other hand, rules that apply to cases arising between private persons, or states, engaged in private transactions with contacts with two or more legal units are called private international law rules or conflict of laws rules.

J. CASTEL, *INTRODUCTION TO CONFLICT OF LAWS* 3 (1978).

18. See *RESTATEMENT OF CONFLICT OF LAWS* (1934); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* (1971).

19. See *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* (1965).

that its potentials for securing a just and humane world public order might be better approximated.

One way to underscore a functional integration of public and private international law is to focus on the concept of international jurisdiction. The term jurisdiction is not used here to signify its use under the much excoriated *Restatement of Conflict of Laws*.²⁰ The term is used after the fashion of the *Restatement of Foreign Relations Law*, which suggests that implicit in the concept of jurisdiction is the principle of competency.²¹ Viewed in this manner, since time immemorial organized bodies politic have sought to make and apply law concerning their fundamental bases of power; viz., land and people. (There are, of course, other bases of power that over time are of importance to a particular body politic). The exercise of jurisdictional competence viewed historically has tended to be rationalized in doctrines drawn from territorial considerations or considerations of group affiliation.²² In contemporary context, the principles conventionally used to allocate the competence to make or prescribe law in so-called public international law reflect not simply principles of territoriality and nationality, but also include doctrines designed to more realistically cope with the complex facts and problems of international life. These doctrines include the protective principle²³ (including impact territoriality), passive personality,²⁴ and principles of universal jurisdiction.²⁵

20. RESTATEMENT OF CONFLICT OF LAWS § 42 (1934). The Restatement defines "jurisdiction" as "the power of a state to create interests which under the principles of the common law will be recognized as valid in other states." *Id.*

21. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 (Ten. Draft No. 2, 1981). The Restatement defines "jurisdiction" as "the capacity of a state under international law (a) to prescribe, or (b) to enforce rules attaching legal consequences to conduct, including rules relating to property, status or other interests." *Id.* In order for a state to have jurisdiction to prescribe or to enforce rules governing conduct, "there must exist between the state and the conduct and its author relationships which are recognized as sufficient to validate the action of the state." *Id.* at 11. Several situations will give a state jurisdiction to prescribe rules governing conduct; among others, conduct taking place within the state's territory, personal presence within the state and domicile within the state. The Restatement adds that "though a state does not have jurisdiction over particular conduct on the basis of territory or nationality it may have jurisdiction to deal with such conduct if there exists between the conduct and the state a relationship . . . which is recognized under international law as a valid basis of jurisdiction." *Id.*

22. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Harris v. Balk*, 198 U.S. 215 (1905). See also *infra* note 62. See generally E. STIMSON, CONFLICT OF LAWS 245-46 (1963).

23. A state may assert extraterritorial jurisdiction to protect interests vital to its existence. C. RHYNE, INTERNATIONAL LAW 117 (1971).

24. A state may maintain extraterritorial jurisdiction over aliens who allegedly have committed crimes against its nationals outside its jurisdiction. *Id.* at 118.

25. Jurisdiction is conferred upon any state to prosecute and punish those commit-

The fundamental policy base of all of these principles of international jurisdiction is to secure a reasonable or rational allocation of competence to prescribe in the common interest. Traditional PIL doctrine reflects a similar evolution, starting with the classification of real, personal, and mixed statutes by the early glossators. The concrete emergence of the state system saw the evolution of theories that have sought to mediate between territorial and personal principles in the search of doctrines that would more consciously and rationally secure the allocation of law-making power in the common interest.

The developments that have occurred in the law of international jurisdiction to prescribe have moved the technical doctrines of public and private international law of the jurisdiction to prescribe much closer together. In *United States v. Aluminum Co. of America*,²⁶ the court stated: "[I]t is quite true that we are not to read general words such as those in this [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'"²⁷ The reference to limitations fixed by "Conflict of Laws" in *Alcoa* was meant to reflect upon the notion that the limitations imposed by the principles of conflict of laws help to refine reasonable applications of the competence to prescribe. This idea is reflected in the *Restatement (Second) of Foreign Relations Law of the United States*, § 40: "Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction. . . ."²⁸ Modern trends have subsequently evolved a principle of reasonableness to guide the assertion of competence to prescribe law in the international system. For example, one attempt lists eight factors that guide the determination of what is reasonable and what is not:

(2) Whether the exercise of jurisdiction is unreasonable is judged by evaluating all the relevant factors, including:

(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and fore-

ting certain crimes such as piracy on the high seas, war crimes, or destruction of submarine cables. *Id.* at 116-17.

26. 148 F.2d 416 (2d Cir. 1945) (antitrust action alleging monopolization of interstate and foreign commerce in the manufacture and sale of aluminum).

27. *Id.* at 443.

28. *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 40 (1965).

- seeable effect upon or in the regulating state;
- (b) the links, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation in question;
- (e) the importance of regulation to the international political, legal or economic system;
- (f) the extent to which such regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity;
- (h) the likelihood of conflict with regulation by other states.²⁹

The jurisdictional rule of reason reflected in the Tentative Draft of the Restatement has been applied in many recent cases and in many different contexts.³⁰ It is tempting to compare and contrast the significant relationship test of the *Restatement (Second) of Conflict of Laws* with the evolution of the jurisdictional rule of reason of the *Tentative Draft of the Restatement (Second) of Foreign Relations Law*. Viewed functionally, the differences should reflect variances in the calculus of reasonableness that are an inherent reflection of different factual contingencies.

A doctrinal connecting link regarding the jurisdiction to prescribe in public and private international law is reflected in the practice of the United States Supreme Court itself. For example, in *Home Insurance Company v. Dick*,³¹ the Supreme Court used the due process

29. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (Tent. Draft No. 2, 1981).

30. See, e.g., *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust and Sav. Assoc.*, 549 F.2d 597 (9th Cir. 1976) (antitrust suit alleging action based on illegal control of Honduran lumber export business was improperly dismissed on jurisdictional grounds, although the activities took place in Honduras and concerned foreign citizens); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (federal court had subject matter jurisdiction over American litigants contesting antitrust activity abroad).

31. 281 U.S. 397 (1930).

clause of the fourteenth amendment to limit the power of Texas to prescribe the conditions of an insurance contract entered into in Mexico.³² The fundamental idea of due process is the principle of reasonableness, although the concrete indicia of reasonableness differ from case to case. In *Home Insurance*, reasonableness simply reflected territorial considerations. The most recent important Supreme Court decision dealing with constitutional limitations on choice of law is *Allstate Insurance Co. v. Hague*.³³ *Allstate* involved a fatal car-motorcycle accident that occurred in Wisconsin. Minnesota law provided for the "stacking" of insurance contracts.³⁴ Decedent's \$15,000 uninsured motorist coverage on each of his three automobiles could be "stacked" to provide total coverage of \$45,000. Wisconsin law did not allow stacking.³⁵ In this case, Minnesota had attenuated contacts with the plaintiff and the question emerged as to whether Minnesota could prescribe its own law to the problem.³⁶ The Supreme Court of Minnesota applied its own law as the "better rule." The constitutional question ultimately involved was whether the use of this "better law," joined with attenuated contacts, would result in an arbitrary and unreasonable prescription by Minnesota.³⁷ The Supreme Court of the United States upheld the Minnesota Supreme Court, but it used, rather artificially, the language of contacts as an index of reasonableness, ostensibly avoiding the question of whether a "better rule" should be the core index of reasonableness, fairness, and possibly, even substantial justice.³⁸ The technical doctrinal problem is how a rule that better serves as an index of justice (the better rule concept) might be viewed as unreasonable for due process purposes. The significance of *Allstate* is that, by implication, it seems to tie modern conflict of laws doctrines like the better

32. *Id.* at 407.

33. 449 U.S. 302 (1981).

34. *Id.* at 306.

35. *Id.*

36. *Id.* at 306-07.

37. *Id.* at 313.

38. The concept of substantial justice was invoked to relax earlier rigid standards of personal jurisdiction. Compare *Pennoyer v. Neff*, 95 U.S. 714 (1877) (no state can exercise direct jurisdiction and authority over persons or property outside its territory) with *International Shoe v. Washington*, 326 U.S. 310 (1945) (nonresident defendant must have minimum contacts with the forum so that suit does not offend notions of fair play and substantial justice); *Hanson v. Denckla*, 357 U.S. 235 (1958) (unilateral activity of those who claim some relationship with a non-resident defendant does not satisfy minimum contacts); *Kulko v. California Superior Court*, 436 U.S. 84 (1978) (parent's consent to his child living in California does not support California's assertion of jurisdiction); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) (in products liability action, foreseeability that a product will enter the forum is not enough to sustain personal jurisdiction over the regional distributor).

rule³⁹ or the most significant relationship to a standard of reasonableness. In this sense, *Allstate* may serve as a precedent that functionally integrates the jurisdictional rule of reason of the *Tentative Draft of the Restatement of Foreign Relations Law* and the reason and rationality presumed to repose in modern conflict of laws doctrine in the United States.

One can therefore agree with the position taken by McDougal and Jasper that the recurrent problem of jurisdiction in both public and private international law is "allocating among states of the world the competence to make and apply law to the transnational events that effect them."⁴⁰ In this view, the competence to make law and apply law "requires a nice calculation of the differential impact of transnational activities, irrespective of the state or non-state character of the actors, upon the members, resources, and institutions of different states."⁴¹ One might add that the fundamental objective of such a system would hardly be defensible if it did not aspire to rational allocation in the common interest. One then may appreciate not only the significance of private international law in its world order context,⁴² but also generate

39. For examples of the use of the better rule concept, see *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) (court willing to apply more progressive rules concerning insurance warranties); *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) (refusal to apply a New York statute which would bar plaintiff's recovery). See generally A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 100-03 (1967 & Special Part with E. Jayme 1973).

40. McDougal & Jasper, *The Foreign Sovereign Immunities Act of 1976: Some Suggested Amendments*, in *PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS* IN 1981, at 6 (M. Landwehr ed. 1982).

41. *Id.*

42. The role of PIL in economic and social development is still little understood or appreciated. The late Professor Otto Kahn-Freund speculated on the interdependence of particular rules of PIL and the particular environmental conditions in the United States and the United Kingdom and emerged with some interesting insights. For example, the United Kingdom, a state with a growing population, could maintain the supremacy of the *lex domicilii* in determining the validity of a multistate marriage and thus retain doctrinal symmetry over the PIL rules governing marriage. In the United States, the internal migratory patterns, "as a normal mode of existence for millions," would have placed on American judges "insuperable difficulties if they tried to find out where the thousands of immigrants and internal migrants had been domiciled at the time of their marriage." O. KAHN-FREUND, *SELECTED WRITINGS* 322 (1978). Again, we find in the area of PIL and torts that the United States rule owed its development to conditions of "the age of industrialisation, of the motorization of transport, of mass media communication." *Id.* at 323. As for English law, the English courts played an insular role, resulting in great difficulties later "for industry, for transport, for liability insurance." *Id.* Professor Kahn-Freund found that in the area of PIL business transactions, the English contracts rule was more coherent and functional than the American rule because of the size and complexity of English international commerce and its preeminence in international trade. *Id.*

ideas about its potential for an even greater contribution to the realization of a world order committed to justice under law. This perspective furthers the pacific settlement of multigroup disputes; it also moves towards a deparochialization of many of the agencies of national decision that make and apply so-called PIL by focusing on the transnational character of decision and by bringing to bear on those decision processes prescriptions of international society that condition the delivery of human rights and human dignity.⁴³

This article seeks to establish that one can develop a coherent, unified, comprehensive, and realistic approach to PIL problems. Past theories of PIL will be examined and compared toward that end. As both public and private international law are deemed in this study to be complementary and indispensable parts of a more comprehensive process of authoritative decision, the standards used to appraise past theories about PIL are basically the same as those used to evaluate theories about international law in general.⁴⁴ It will be seen that past theories, while perhaps at one time progressive in nature, are now limited in both their perspectives and utility, for these individual schools fall short of a comprehensive theory about PIL.

Contributions of past theories have sought to localize PIL problems and their solutions by directing theory construction to connecting links between problems, parties, and groups. Past theories have all contributed to a deeper understanding of the subject. For example, theories have focused on territoriality, personality, political and cultural affiliation, political authority (sovereignty), reciprocity (comity), and international obligation (vested rights) as guides to understanding and justifying the formulation and application of PIL. Modern theories have concentrated more on the nature and role of those charged with judicial decision-making and have been concerned about why a judge should ever displace the law of the forum. Such theories have directed attention to the relationship of the courts (the legal process approach) and, grudgingly, other mechanisms of decision to social, political, and economic interests involved in decisions about PIL. Yet these individualistic boons constitute only pieces of a comprehensive theory of PIL. As a counterpoint to the piecemeal attempts of the past, this article will present a comprehensive analysis of PIL and the choice of law problems through the application of policy-oriented jurisprudential

43. See generally M. McDougal, H. Lasswell & J. Miller, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967); McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959).

44. See *supra* note 43. See also McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968).

concepts. Before reviewing these existing theories and offering a contextual alternative, the following section will set out in preliminary form the broad structural outlines of a PIL paradigm.

II. FACTUAL OUTLINE OF A PIL PARADIGM

A. *The Relevant Social and Political Background*

A seemingly innocent PIL problem can be transformed into conundrums of almost limitless complexity by the mere addition of "foreign elements." A simple hypothetical will serve to illustrate both the simplicity of a conflict of laws problem viewed factually and the complexity of analysis it might encompass when seeking its resolution. Consider the case of *In Re Schneider's Estate*.⁴⁵ A naturalized American citizen of Swiss origin died in New York County leaving real property located in Switzerland as an asset in his will. This disposition of the property by testamentary act was contrary to Swiss internal law, as that law conferred a right on the "legitime," the legitimate heir, to a specified fraction of the decedent's property.⁴⁶ The disposition of an "immovable" is ordinarily adjudicated by the *lex situs*. The realty, however, had been liquidated and the administratrix of the probate proceedings transmitted the proceeds to New York.⁴⁷ These proceeds were subsequently included in the accounting of the estate assets.⁴⁸ Switzerland apparently would apply the law of the domiciliary.

Viewed in factual terms, the problem is a simple one. The administratrix wants to execute the decedent's will. Particular state laws may differ on the character and scope of such a proceeding. A decisional response might be formulated to accord with community policies of the different states ostensibly "interested" in the problem. These policies might, for instance, prescribe what the nature of state intervention ought to be with respect to the decedent's autonomy in matters of testate succession.

A New York court seized of the problem presupposes a number of things in its disposition of the matter. First, it implies that the American forum had "judicial jurisdiction" over the parties and the subject matter, and second, that the court had "law-making jurisdiction" to adjudicate the claims with the result that the decision would be

45. 198 Misc. 1017, 96 N.Y.S.2d 652 (Sur. Ct.), *aff'd on rehearing*, 100 N.Y.S.2d 371 (1950) (the court held that under Swiss law the proceeds of the sale of the Swiss realty would be distributed according to the internal law of New York, and that under New York law no impediment existed to disposition described by the will).

46. *Id.* at 1019, 96 N.Y.S.2d at 655.

47. *Id.* at 1020, 96 N.Y.S.2d at 656.

48. *Id.* at 1025-26, 96 N.Y.S.2d at 660-61.

honored or deferred to by the state in which the realty was situated or by the state of the decedent's nationality or domicile. Thus, one is concerned with two kinds of power related competences: law-applying competence involving jurisdiction and judgments; and law-making or prescribing competence concerned with the substantive criteria of choice to determine who wins and who loses.

The court in this case first asserted judicial jurisdiction, or a law-applying competence because the decedent had died within an arena over which New York courts traditionally claim judicial jurisdiction. The New York court did not defer to the jurisdictional authority of Switzerland. In addition, the New York court entertained a claim to law-making jurisdiction; the court chose not to honor Swiss policy but to prescribe its own "choice of law" policy. An initial stratum of analytical complexity is encountered because New York law requires the New York court to defer to the law-prescribing competence of Switzerland. Further complicating the problem, Swiss law would defer to the prescribing competence of New York.⁴⁹

The case represents an example of the doctrine of *renvoi*, as the New York decisionmaker is trapped in a circular rule requiring him to defer to the law of another forum, which in turn refers him back to New York law. What are his options? First, if he applies New York law, he is formally violating Swiss law. To make matters worse, he could formally violate his own law, as well as that of Switzerland, by applying internal Swiss law.⁵⁰ If such a problem is at all instructive, it is because it illustrates how the complexities of a PIL problem can result in the dangers of both mechanical jurisprudence and of excessive formalism.⁵¹ A mechanical honoring of prescribing competences can have theoretical and practical drawbacks, since honoring a prescribing competence ostensibly avoids the question of the content of prescription and its impact upon a multistate social process.

1. The Social Process Context

The *Schneider* case provides a convenient example for setting out in brief preliminary form the social and political context of PIL. The key societal bases of PIL can be derived from the obvious assumption that a PIL outcome presupposes the existence of society, *i.e.*, a social process. In order for such a process to function at all, an assurance of

49. *Id.* at 1026, 96 N.Y.S.2d at 661.

50. *Id.*

51. Creation of harmony of law is one of the ultimate goals of PIL. For examples of excessive formalism, see *Catalano v. Catalano*, 148 Conn. 288, 170 A.2d 726 (1961); *Brook v. Brook*, [1861-73] All E.R. 493; *Hyde v. Hyde*, reprinted in [1861-73] All E.R. 175.

basic security is required for the participants. The condition of basic security may be described as the "minimum order" dimension, a dimension that can only be established and maintained by the collective action of, or control by, human aggregates. The power required to establish and maintain the integrity of any human aggregate invariably requires the formation of a "group." Power is then mainly a function of group behaviors.

The essential precondition of PIL might be conceptualized in terms of a model of the world social process generating the power outcomes necessary for the minimum conditions that buttress collective security and the pursuit of basic social objectives in groups. The exercise of group power may be observed in terms of power-actors defined mainly by reference to the interrelated notions of group, community, functional community, nation, state, tribe, clan, or family. The family may be seen as a functional group in the sense that it is a power instrument whose principal goal value is specialized, in part, to effectuate the allocation of affective sentiments. The social and power preconditions of PIL may be vividly abstracted from the case of inheritance across state lines. In effect, the claimants are making competing demands as to whether the law of the New York "group" or the Swiss "group" should control the disposition of the property. The power complexities of this problem are readily apparent.

It will be seen from the above model that the rules of PIL, viewed functionally, allocate law-making and law-applying competencies between concerned jurisdictions. Fundamentally, this allocation is a function of control and authority—of group power in a broad sense. Empirically, power is an outcome of social process, and world power outcomes similarly result from the nature of the world social process. Indeed, it may be said that one of the significant outcomes of the world process is the claim to power made by elites who largely control and regulate groups, formed by them from bases of power, in which group related behaviors loom large. These claims usually concern control over people, events, or land and other resources. When allocations relating to such claims are reciprocally honored with a high degree of frequency and the expectations of various power-brokers are stabilized in patterns of recurring practices, we refer to this process as a constitutive process.⁵²

52. See Jenks, *Some Structural Dilemmas of World Organization*, 3 GA. J. INT'L & COMP. L. 1, 11 (1974). "The decentralized structure of world organization has become far more complex than could then have been envisaged." *Id.* (referring to the framing of the Charter of the U.N.). According to Jenks, the decentralized system "is the outcome of deliberate decisions of policy at the highest level . . . among governments . . ." *Id.* at 12. See also McDougal, Lasswell & Reisman, *supra* note 12. The constitutive process is

The factual predicate of any workable theory of or about PIL must ultimately reflect relative stability in expectation about the allocation of power or competence to make and apply law to events, persons, and values over which control is shared by more than one state. This is the factual background for the legal myth and operational basis of the outcome of social process called PIL. Because of the "group" nature of the processes of interaction that make for PIL outcomes, the process may be described as being composed of consociational elements,⁵³ one in which humans functioning mainly through "groups" as individuals and aggregates seek values through institutions based on resources. These processes cut across group lines. As has been stressed, one of the salient value processes in these interactions concerns the power or competence of authority structures to prescribe and apply policy for the allocation of values between all groups whether they be territorial or

part of a more inclusive concept: the public order. The public order embraces all value patterns and institutions of social process. The process that formalizes and ritualizes expectations about value patterns and institutions specialized to power is designated as the constitutive process. *Id.* at 277.

53. On the notion of consociation, see generally Lijphart, *Consociational Democracy*, 21 *WORLD POL.* 207 (1969). See also Daalder, *The Consociational Democracy Theme*, 26 *WORLD POL.* 604 (1974). The two key themes in the notion of consociational democracy are (1) group dynamics and (2) allocation of power. The idea incorporates probably all of the following: "vertical pluralism," "segmented pluralism," "social fragmentation," "ideological compartmentalization," "verzuiling" (pillarization) and more. *Id.* at 606. The model of consociational democracy tends to "show a curious mixture of ideological intransigence on the one hand and pragmatic political bargaining on the other. Separatism makes for a dogmatic, expressive style of politics within ideological families. But relations among subcultures are settled by a process of careful and businesslike adjustments." *Id.* at 607. See generally L. POSPISIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* (1971). Daalder continues:

[C]onsociational democracy tends to have an extensive network of functional organizations within ideological families, which allows a means of controlled representation for special interests. The prevalence of myriad ideological organizations is therefore not necessarily a sign of impending battle. Rather, it provides the organizational infrastructure on which elites can operate in an atmosphere of discretionary freedom, coupled with a fair guarantee of consensus. In the view of some authors, such ideologically separate groups also help to minimize opportunities of conflict: "good social fences," in Lijphart's words, "may make good political neighbors."

Daalder, *supra*, at 608.

A major weakness in the typological model of consociational democracy is its reticence on why and how such consociational systems develop. Major exponents of its development have included such scholars as Arend Lijphart. See, e.g., A. LIJPHART, *THE POLITICS OF ACCOMMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS* (1968). The most refined answer is proffered in McDougal, Lasswell & Reisman, *supra* note 12; McDougal, Lasswell & Reisman, *The World Process of Effective Power* (available in the *Offices of the New York Law School Journal of International and Comparative Law*).

functional. It is the group basis of global political society that is accordingly emphasized. As Earl Latham put it: "The conclusion emerges from an inspection of the literature dealing with the structure and the process of groups that, insofar as they are organized groups, they are structures of power. They are structures of power because they concentrate human wit, energy, and muscle for the achievement of received purposes."⁵⁴ He went on to add that the group and the state were of "the same genus"⁵⁵ and that "the state as an association (or group) is not different from other associations, like churches or trade unions. That which puts both state and nonstate associations in the same category of forms is the common factor of power."⁵⁶

If there is a key structural dimension that aids in understanding the social process background of PIL, it is the concept of the "group" at whatever level of simplicity or complexity it is defined. The location of any discrete group in space and through time, in proximity to other groups, it is suggested, is a consociative process. This makes PIL a politically important outcome with far-reaching potentials for a just and humane world public order.

The microcomponent of any group process through time is the primary self and all that it includes. When a number of primary selves succeed in including diversified perspectives and operations into a more inclusive definition of the self, we have a "group" formation.⁵⁷ This means the individual may have a multiplicity of group lives engendering identifications that vary in degrees of inclusivity or exclusivity, identifications that vary in frequency, intensity, and duration of the pattern through time. The expansions and contractions of the self-system withdrawing from and associating with different groups are reproduced at every level of social organization.⁵⁸ The structural dimen-

54. Latham, *The Group Basis of Politics: Notes for a Theory*, 46 AM. POL. SCI. REV. 376, 382 (1952).

55. *Id.*

56. *Id.* "The chief social values cherished by individuals in modern society are realized through groups." *Id.* at 376. See also D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1951); V. KEY, *POLITICS AND PRESSURE GROUPS* (1958); Nagan, *The Black American Reaction to Apartheid*, 4 ISSUE 25 (1974). Groups may, of course, be complex or simple.

57. See H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* 29-51 (1963). "Groups are formed by integrating diversified perspectives and operations. The effect of a group on values is determined in part by morale, which in turn is affected by permeability and circulation in the group." *Id.* at 29. "A group is an organized aggregate. An association is a highly organized group, a *demigroup* one with a lower degree of organization." *Id.* at 31.

58. The dynamic fluidity of components of the global constitutive process is well defined in Hertz, *Rise and Demise of the Territorial State*, 9 WORLD POL. 473 (1957). This article emphasizes, in particular, those changes in the global process that have affected in some degree the conditions of power related outcomes. "Now that power can destroy

sions of multiple identification outcomes have shaped what Pospisil⁵⁹ has called the multiplicity of legal systems within social systems of whatever level of inclusivity and complexity.⁶⁰

The microcomponent of any group is the individual. Just as individuals identify and affiliate with multiple groups, individuals and associations of individuals advance their objectives through specialized institutions cutting across and impacting upon other group-based processes. Such institutions may specialize in the shaping and sharing of power outcomes. Such institutions include wealth generating associations like multi-national corporations, affection generating units like the family, knowledge generating institutions like international universities, rectitude purveying institutions like the church, and health-generating institutions like the modern hospital.

Generally, when the pursuit of values through institutions becomes highly structured, and when resort to them is a recurrent outcome of the social process, such a set of patterned and specialized practices may be designated an operation. The comparative law component of PIL outcomes is apparent when one discerns that such operations may be usefully compared and contrasted cross-culturally, or across group lines, according to the degree to which they facilitate the shaping and sharing of demanded values in the common interest. A decisionmaker in PIL, seized of a claim having a foreign element, inevitably makes choices that directly compare and weigh the relative effi-

power from center to center, everything is different." *Id.* at 489. See also Kaplan, *Balance of Power, Bipolarity and Other Models of International Systems*, 51 AM. POL. SCI. REV. 684 (1957). Kaplan notes that within the structure of the international system:

Functional lines of organization are stronger than geographical lines . . . Functional cross-cutting makes it most difficult to organize successfully against the international system or to withdraw from it. Even if the constitution of the system were to permit the withdrawal, the integration of facilities over time would raise the costs of withdrawal too high.

Id. at 694. It is this "integration of facilities over time" that is the core subject of the PIL dimension. *Id.*

59. Pospisil, *Legal Levels and Multiplicity of Legal Systems in Human Societies*, 11 J. CONFLICT RESOLUTION 2 (1967). Pospisil's basic thesis is that "[e]very functioning subgroup of a society has its own legal system which is necessarily different in some respects from those of other subgroups." *Id.* at 9. Pospisil concludes in this regard that:

Consequently, law in a given society differs among groups of the same inclusiveness (within the same legal level); thus different laws are applied to different individuals. Law also exhibits discrepancies between legal systems of subgroups of different inclusiveness (between different legal levels), with the consequences that the same individuals may be subject to several legal systems different in the context of their law to the point of contradiction.

Id.

60. See generally A SOCIOLOGICAL READER ON COMPLEX ORGANIZATIONS (A. Etzioni 2d ed. 1969).

ciency of institutional practices by which values are principally realized in transgroup contexts. Such decisions also have impact upon net value gains and losses of the public order as a whole.

The social process background of PIL contains, therefore, the operation of power-conditioned behaviors across group and state lines. The "constitutional" design⁶¹ of such power-group perspectives and practices, in a world-wide sense, encompasses the central characteristics about how law is made and applied in the international society. Viewed in this light, PIL represents outcomes of the larger world process of authoritative decision concerned with the allocation of law-making and law-applying competencies across group and state lines. In this sense, PIL is not a body of law distinct from international law. It is an indispensable and complementary *component* of the larger world process of authoritative decision called international law. It should be noted again that this focus of inquiry belies the distinction often made between the so-called internal conflicts problems of pluralistic states and those of the international system. As both internal and international conflicts problems deal with factual claims for the allocation of values cutting across group and state lines, the demands concerning *power* and *justice* maintain essentially the same generic constitutive and public order dimensions.

The *Schneider* case, then, is about international law. The case shows the complexity that must inevitably engulf a decisionmaker who endeavors to account for transgroup power arrangements and still tries to honor demands for individual justice. The problems that may be encountered in the manipulation of doctrine (*renvoi* in this case) often reflect an excessive, if not irrational preoccupation with power accommodations (mechanical reciprocal tolerances). Less concern is sometimes accorded to an estimate of the net gains and losses to the parties and the larger public order in the exercise of choice.

2. The Basic Political Context

PIL then is a response to claims in which a particular state, whose decision apparatus is not formally seized of the problem and does not have immediate *de facto* control over the relevant participants or subject matter, nevertheless maintains a demand through a claimant that some other state, which is seized of the problem and *does* exercise control over the parties and subject matter, should yield its competence. Such a claim implies an expectation, under certain conditions, that reciprocal tolerances be part of the criteria of decision. Reciprocal toler-

61. See generally M. McDUGAL & W.M. REISMAN, *supra* note 16, at 1271-1551.

ances enhance conditions of stability of expectation in the exchange of goods and services across state and national lines.

When a state defers to the law-making and law-applying competencies of another state, such deference is influenced greatly by the expectation of reciprocity in the event that the pattern of control is reversed in the future. The exercise of mutual restraint implies that the expectation of reciprocal tolerances is meant to avoid the parochialism of prospective retaliation which could have a detrimental effect on value exchanges impacting across state and group lines. Expectations of restraint and reciprocal tolerances are crucial factors in the authority component of transnational or transgroup decision. Indeed, the predominant trend of decision in PIL has entrusted an extraordinary sensitivity to the accommodation of power realities⁶² in the interstate and international system. Moreover, if PIL were simply to underwrite retaliatory practices, the losses to vast sectors of transnational interaction could be staggering in this interdependent world.

In the aggregate, PIL can be seen to represent an important outcome of the world process of authoritative decision.⁶³ The importance

62. The literature on power in the international environment is extensive, although it does not advert to PIL. See generally J. BURTON, *INTERNATIONAL RELATIONS: A GENERAL THEORY* (1965); I. CLAUDE, *POWER AND INTERNATIONAL RELATIONS* (1962); R. DAHL, *MODERN POLITICAL ANALYSIS* (2d ed. 1970); D. EASTON, *A FRAMEWORK FOR POLITICAL ANALYSIS* (1965); D. EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* (1979); W. FOX, *THEORETICAL ASPECTS OF INTERNATIONAL RELATIONS* (1959); R. GOLDWIN, *READINGS IN WORLD POLITICS* (3d ed. 1970); S. HOFFMAN, *CONTEMPORARY THEORY IN INTERNATIONAL RELATIONS* (1960); S. HOFFMAN, *THE STATE OF WAR* (1965); K. HOLSTI, *INTERNATIONAL POLITICS* (1967); E. KIRNAN, *THE LORDS OF HUMAN KIND* (1972); K. KNORR, *THE INTERNATIONAL SYSTEM* (1961); H. LASSWELL, *POLITICS AND PERSONAL INSECURITY* (1935); H. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, AND HOW* (1936); R. MACIVER, *THE MODERN STATE* (1962); M. MCCLELLAND, *THE THEORY OF THE INTERNATIONAL SYSTEM* (1966); R. MERRITT & S. ROKKAN, *COMPARING NATIONS* (1966); H. MORGENTHAU, *POLITICS AMONG NATIONS* (4th ed. 1967); N. PADELFORD & G. LINCOLN, *THE DYNAMICS OF INTERNATIONAL POLITICS* (2d ed. 1967); L. RICHARDSON, *ARMS AND INSECURITY* (1960); R. ROSENCRANCE, *ACTION AND REACTION IN WORLD POLITICS* (1963); B. RUSSETT, *TRENDS IN WORLD POLITICS* (1965); B. RUSSETT, H. ALKER, JR., K. DEUTSCH & H. LASSWELL, *WORLD HANDBOOK OF POLITICAL AND SOCIAL INDICATORS* (1965); J. SINGER, *THE POLITICAL SCIENCE OF HUMAN CONFLICT* (1965); H. SPROUT & M. SPROUT, *FOUNDATIONS OF INTERNATIONAL POLITICS* (2d ed. 1962); O. YOUNG, *SYSTEMS OF POLITICAL SCIENCE* (1968); Carniero, *A Theory of the Origin of the State*, 169 *SCIENCE* 722 (1970).

63. See McDougal, *The Impact of International Law upon National Law: A Policy Oriented Perspective*, in *STUDIES IN WORLD PUBLIC ORDER* 157, 185 (M. McDougal ed. 1960). McDougal states:

For regulation of the claims asserted by the various states to authoritative control over particular values changes, both within and beyond their territorial boundaries, the general community of states prescribes an elaborate set of flexible and complementary doctrines, designed both to allow any particular state substantially affected by events to assert its authority over such events and yet

of PIL to the public order of the world community can be more fully appreciated when its international significance is considered.⁶⁴ Linked as it is to global interdependence and interdetermination, PIL performs an important function in facilitating the exchange of goods and services and the movement of human beings across state and community lines.⁶⁵ From an observer's point of view, PIL encapsulates value

to achieve a compromise between conflicting claims in a public order which will permit the world's work to get on. One set of prescriptions, sometimes called the "bases" of jurisdiction—the principle of territoriality, the principle of nationality, the principle of universality, and other principles—authorizes states which have secured a degree of effective control over persons or resources to exercise their authority, under stipulated conditions of significant impact upon national values, to make and apply their law to certain particular events in which such persons or resources have been involved. A second set of prescriptions requires states, despite the fact that they may have acquired effective control over the persons and resources involved, to yield that control in deference to the "acts of state" or "immunities" of other states and to permit such states to make and apply their law to the events in question. Still other prescriptions seek to individualize and make applicable the policies embodied in both sets of prescriptions, both those expressing the primary assertions of authority and those requiring deference to others, in a way to take into account the special characteristics of the various spatial domains: land, the oceans, air space, and outer space. The function of all these various prescriptions is not arbitrarily to dictate decision but rather to focus the attention of decision-makers upon all the significant features of a context in controversy and to assist in assessment of the varying relevance and importance of such features in determining degree of impact upon national values. The overriding policy infusing all prescriptions is that of creating a stability in the expectations of state officials that the aggregate flow of controversies will be handled in the "agreed" ways and, hence, that the officials may make their power, wealth, and other value calculations with minimum disruption from arbitrary and unrestrained coercion and violence. The net effect is, in sum, that a state substantially affected by any particular event is authorized to make and apply law for that event, upon condition that it take into account the degree of involvement of the values of other states in the same or comparable events, and that the community of states as a whole achieve a measure of subordination to public order of other participants—individuals, private associations, pressure groups, and parties—in a relatively ordered exploitation of the world's resources, sharable and nonsharable.

Id. See also R. MINOR, *CONFLICT OF LAW; OR, PRIVATE INTERNATIONAL LAW* (1901). Minor suggests that PIL is an "answer to the demands of justice and an enlightened policy." *Id.* at 5.

McDougal briefly analyzes PIL from his policy orientated perspective in McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, in *STUDIES IN WORLD PUBLIC ORDER* 947, 967 (M. McDougal ed. 1960).

64. See P. KALENSKY, *TRENDS OF PRIVATE INTERNATIONAL LAW* (1971). Kalensky asserts that "internationality" is an essential component of PIL without which "this law would lose the *raison d'être* of its existence." *Id.* at 16.

65. The need for PIL was not recognized in Medieval Europe; a time of slight eco-

exchanges encompassing various phases of every value process.

3. The Salience of Multi-State Power and the Constitutive Process

When people make claims that cut across group lines, they entertain an expectation that they may appeal to structures of authority, at whatever level of formality, to respond to those claims. This means claimants have expectations that some kind of lawful response will derive from decision-structures that are established and maintained by some kind of transgroup constitutive process. Indeed, this in fact is a major purpose of what Professors McDougal, Lasswell and Reisman call an unwritten and thoroughly decentralized world constitutive process.⁶⁶ An essential social process condition of a PIL outcome is that control over people, events, and resources through space and time is *ex hypothesi* shared. Shared controls sensitize power-brokers to the limits of coercion or naked power, because in the crudest sense, the prospect of retaliation usually reduces the cost effectiveness of its utilization.⁶⁷

nomic intercourse between nations. The need for such rules arose with "the revival of commerce, the surer guaranties offered for the safety of travelers by reason of the more orderly condition of the European States, the more frequent intercourse between nations, and the advancement of conceptions of justice and order . . ." R. MINOR, *supra* note 63, at 1. See also J. BEALE, *A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW* (1916).

[A]nd now that our whole manner of life is based upon exchange of products between nations, a body of legal principles to regulate international judicial relations is as supremely needed as a similar body of principles to give effect to ordinary contracts or protect ordinary property. International commerce is necessary to modern civilization; and "international commerce would be impossible if there did not exist a law which has for its object and effect to favor the international extension of human activity."

Id. at 5.

66. See, e.g., McDougal, Lasswell & Reisman, *supra* note 12.

67. PIL as an outcome of the global social process may usefully be viewed as being concerned with responding by control and regulation to several major features of human behavior in groups. Professor Boulding conceptualizes these in terms of threats, bargains and integrated relations. See Boulding, *Toward a Theory of Peace*, in *INTERNATIONAL CONFLICT AND BEHAVIORAL SCIENCE* (R. Fisher ed. 1964).

In a threat situation, groups are organized around a deterrent and retaliatory relationship: Do what I wish (or forbear from activity which I disapprove), or I'll do something nasty to you. In a bargaining relationship, groups are organized around an agreement as to what each party shall give and take, or perform and receive, in a transaction: You do something nice for me, and I'll do something nice for you. An integrative relationship entails the incorporation of parts into a new whole, with ends and characteristics separate and distinct from the parts. In such a situation, the parts, while generally retaining their differences, are so structured as to function as a coordinate, harmonious unity. Integration in this sense is often compared to the Biblical concept of a marriage, in which the part-

When, however, a decisionmaker seeks to honor such a claim, the challenge to transgroup law-making becomes acute. If he were to ignore the multistate aspect of the problem and prescribe law identified with his own "group," he runs the risk that the other group sharing a concurrent or sequential competence to prescribe may respond in kind: *lex talionis*. The power process may establish and maintain structures of transgroup authority that support the ideology of unilateralism. Often, however, workings or outcomes of the system have, in the aggregate, been significantly different. The avoidance of parochialism and chauvinism in PIL appears, on the whole, to have been an influential and important community expectation in a decentralized world decision-making process. Indeed, an elaborate superstructure of symbol and myth has been established in PIL and other allied fields that enables groups having formal and effective control over claim precipitating events to honor each other's law-applying and/or law-prescribing competences.

B. Nature of Prescriptive Process in PIL

1. Claim, Decision, and the Choice of Law Process

PIL claims always involve the assertion of applicative and prescriptive competencies. Hence, in responding to a PIL claim, a decisionmaker has to give particular attention to the prescribing and applying decision functions. When a claimant makes a demand on a state to honor another state's prescribing competence, the decisionmaker should be aware that the existence of a foreign element does not mean that he has an obligation to honor that demand. A distinction should, in the first instance, be drawn between a claim for competence and a decisional response thereto.

Judges and scholars have long struggled with the problem of "choice of law," *viz.*, when, why, and how a decisionmaker should or should not honor the law-making competence of another state. Various theories have been advanced to explain the nature of such a decision, such as comity, territorial sovereignty and vested rights, and the local law theory, to name a few.⁶⁸ These theories were often question-beg-

ners, while retaining their individuality, achieve a union the source and animating principle of which seems shrouded in mystery.

Wood, *Public Order and Political Integration in Contemporary International Theory*, 14 VA. J. INT'L L. 423, 423 (1974).

68. See *infra* Section IV. See also *Hanson v. Denckla*, 357 U.S. 235 (1958). According to Chief Justice Warren, the applicative competence of a state court "is limited by the extent of its power and by the coordinate authority of sister States." *Id.* at 246. See also the cases cited in this connection: *Riley v. New York Trust Co.*, 315 U.S. 343, 349 (1942);

ging and told little about the who, how, when, why, and which of the choice of law process. Under the traditional approach, the choice of law problem did not adequately inform decisionmakers about the conditions under which they should honor another state's law. These questions go to the nature of the choice of law process itself: Why should a court honor the law-making competence of another state? What methodologies of decision, informed by what criteria of choice, should a decisionmaker embrace to honor law-making and law-applying competencies in the most desirable way?

To answer these questions one must recognize that what is called PIL is in reality a response to certain types of claims that are outcomes of the social process. It will be shown that maintaining a distinction between the processes of claim and decision enables one to share deeper insights into the nature of PIL, and more particularly, the choice of law process, or more broadly, the prescribing process.

2. Process of Claim

The process of claim in PIL encapsulates all phases of all value processes. For example, claims may be made for wealth, power, respect, affection, rectitude, skill, well-being, and enlightenment. As an illustration, claims relating to the affection process may be made with reference to participants, perspectives, base values, situations, strategies, outcomes, and effects. The structure of a PIL claim invariably involves greater complexity than a claim in which anticipated satisfaction is confined to the internal value processes of a single state. This complexity is highlighted by the fact that PIL claims may involve both primary and secondary assertions about the allocation of applicative and prescriptive competencies.

a. Claims relating to applicative competencies

Claims are made for and about applicative competencies in PIL. These claims broadly cover demands relating to the allocation of adjudicatory competencies such as judicial jurisdiction, judgments, and the honoring of foreign judgments. In the PIL context, claims relating to a law-applying competence usually emerge as claims for the assertion of primary and secondary competencies. A claim relating to a primary applicative competence is a demand that a law-applying competence be directly exercised. Those relating to a secondary assertion of a law-applying competence demand that a state honor or defer to the law-applying competencies of another state, or that such a competence be

indirectly exercised.

b. Claims relating to prescriptive competencies

Claims relating to a competence to prescribe policy cover essentially the law-making function and in PIL are roughly equivalent to claims associated with the choice of law process. Claims relating to a prescriptive competence also have a primary and secondary character. Primary prescriptive competencies contain the demand that the decisional forum itself exercise a direct law-making competence. Those relating to a secondary competence demand that deference be given to the law-making competencies of another state.

3. The Process of Decision Relating to Prescriptive Competence

PIL claims require decisions of extraordinary complexity. A detailed decisional model based on the decision functions distilled by the New Haven School of International Law is set out in the following chapter.⁶⁹ At this time, a provisional overview of this model is given in order to more fully illuminate the context and the character of one aspect of PIL, the choice of law process.

The decision-making process in PIL represents a complex of three types of decisions germane to almost any PIL problem. First, there are the basic public order decisions determining how substantive values are allocated across state lines. Second, there are the constitutive decisions which deal with the establishment and maintenance of structures of authority on the transstate level. In PIL, these decisions deal mainly with the expectations of reciprocal tolerances. Third, there are the civic order decisions in which "individual" claims to the shaping and sharing of values receive high deference in public order and constitutive process priorities.⁷⁰

69. See *infra* Section IV.

70. See, e.g., M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 8, at 465-66, 799-802, 801 n.5, 815-60.

By civic order . . . we refer to the features of social process that are cultivated and sustained by recourse to relatively mild rather than severe sanctions. It is the domain of social process in which the individual person is freest from coercion, governmental or other, and in which a high degree of individual autonomy and creativity prevails. Civic order thus includes all of the processes and institutions of private choice, as distinguished from public decision. The core reference of civic order is . . . to freedom of choice for participation in each of the value processes . . . [T]he focus here is upon a freedom of choice not involving immediate and particular public decision; our concern is for the larger flow of decision protecting aggregate patterns of freedom of choice for all individuals and groups. The distinctive reference of civic order is to the totality of freedom of

All critical decision functions are relevant to the making and the applying of law in PIL. They embrace all relevant intellectual tasks such as clarification of policy, trend studies, analysis of trends, prediction of trends, and alternative scenarios, in addition to specialized decision functions of intelligence, promoting, prescribing, invoking, applying, terminating, and appraising.⁷¹ Of these important decision functions, the applicative and prescriptive functions perform unique constitutive and public order functions in PIL.⁷² A fuller appreciation of how these functions are discharged in this area is the key to understanding the conceptual basis of PIL.

Traditional theories in this area have sought to avoid an overt concern for substantive results by giving little weight to all of the complex phases of the prescribing process of PIL. Here, judges and theorists have often subscribed to the myth that judges "find" law. Indeed, judges often purport to "find" the law by giving an exaggerated significance to decision functions more closely allied to the applicative decision function. Professor Cavers described this method of PIL decision-making as the "jurisdiction selecting formula."⁷³

C. *The Nature and Challenge for Decision in the Choice of Law Process*

To truly understand the choice of law decision in PIL, one must

choice achieved or achievable in a community.

Id. at 815-16.

71. See, e.g., Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971); Lasswell & McDougal, *Trends in Theories About Law: Comprehensiveness in Conceptions of Constitutive Process*, 41 GEO. WASH. L. REV. 1 (1972); McDougal, *Law as a Process of Decision*, 1 NAT. L. F. 53 (1956); McDougal, Lasswell & Reisman, *supra* note 44; McDougal, Lasswell & Reisman, *supra* note 12; Reisman, *A Theory About Law From the Policy Perspective*, in *LAW AND POLICY* 75 (D. Weisstub ed. 1976).

72. The prescriptive function "[p]roject[s] authoritative policies," Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 385 (1971), and "is the crystallization of general policy in continuing authoritative community expectations," McDougal, Lasswell & Reisman, *supra* note 44, at 192. The applicative function has been defined as the "final characterization of concrete circumstances according to prescriptions," *id.*, and the "[f]inal characterization and execution of a prescription in a concrete situation," Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 387 (1971). For an example of the application of human rights prescriptions, see McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 VA. J. INT'L L. 387 (1974). See also McDougal, *The Application of Constitutive Prescriptions: An Addendum to Justice Cardozo*, 33 REC. A.B. CTRY N.Y. 255 (1978). The terms prescriptive and applicative competence are also used in the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 17-20 (1965).

73. See D. CAVERS, *supra* note 3.

consistently maintain the perspective of an observer. One must attempt to distinguish between the interactor's perspectives (including those of observers), claimants, and decisionmakers. In dealing with PIL's choice of law aspects, it should be noted that the outcomes of the interaction process lead to claims. PIL is a decisional response to these claims. It should be first noted that when one deals with what is traditionally called choice of law he is dealing with prescription, and more specifically, prescription by essentially one agency of decision: the courts. One should be fully aware at the outset that prescription is a broader, richer notion in this field, and that an accurate description of prescription would include both the formal and the living law. This means, in practical terms, that many participants at multiple levels of decision participate in the making and, indeed, application of multistate law. The focus of the courts in the analysis that follows underscores only that the formalized doctrines have been most visibly expressed in that arena.

When a party has a claim, in this context, what is demanded in *judicially controlled arenas* is that a state, or group other than the forum state, has the competence to prescribe policy relative to the claim. For instance, the demand may be that State A honor a contract, which is against its policy, because State B has the competence to prescribe whether the contract is enforceable and would regard such an agreement as enforceable. The claim that a contract be honored has a two-fold aspect. First, it is a claim relating to competence or power. What is communicated is a claim that the decisionmaker in State A does or does not have a direct law-making competence to prescribe policy. Second, the claim involves a demand for wealth—that a contract is or is not enforceable. Knowing what is demanded is important to decision-making, because it assists the decisionmaker in limiting the scope of the decisional response to the actual demand.

Constraints upon how claims for value are communicated to a decisionmaker have had a significant influence upon the scope of the choice of law problems presented for adjudication and upon the comprehensiveness of decisional responses. Consider, for example, constraints placed on pleadings, which are essentially a form of communicating demands. Traditionally, a claim had to be molded in such a manner as to fall within a writ, or form of action, provided by the "sovereign." This formulary system gave way to more flexible modes of communicating a claim to a decisionmaker, and the phrase "form of action" was replaced by the idea of a "cause of action." While an improvement, this latter concept was insufficiently flexible to enable a decisionmaker to focus on the factual aspect of a claim. New rules of procedure in the United States and many other countries have sought

to avoid these medieval ghosts by adopting a new system of procedure, notice pleading, which merely demands that the claimant communicate a short statement of claim showing that he is entitled to relief.⁷⁴ This overview of pleadings simply demonstrates that the more formalistic the process by which a claim is communicated, the less leeway a decisionmaker has to focus on the claim's factual dimensions. Thus, in choice of law, this has often meant that the problem was inadequately delimited as presented for a decisional response to claims reflecting a demand that the court select jurisdiction A or jurisdiction B to supply the rule of decision.

Basically, a scientific observer would seek to understand problems in empirical terms. The influence of the formulary system of pleadings in Anglo-American jurisdictions would have made this a more difficult undertaking. PIL problems in the courts appear in the past to have left undifferentiated the distinctions between claim and decision, making it difficult to get an adequate description of the process. It should be recognized that the claim emerges, *inter alia*, as a demand for reciprocity.⁷⁵ The decision represents the making and application of transgroup

74. See FED. R. CIV. P. 8(a) ("A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . .").

75. The concept of reciprocity is considered by some anthropologists to be a foundation of social interaction in any social process. The most influential exposition of this idea is found in M. MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETY* (I. Cunnison trans. 1967). According to Professor Evans Pritchard, this book is the "first systematic and comparative study of the widespread custom of gift exchange and the first understanding of its function in the articulation of social order." *Id.* at ix. The fundamental problem addressed by Mauss was to explain why "presentations which are in theory voluntary, disinterested and spontaneous" turn out to be "in fact obligatory and interested." Mauss continues: "The form usually taken is that of the gift generously offered; but the accompanying behavior is formal pretense and self deception, while the transaction is itself based on obligation and economic self interest. . . . What is the principle whereby the gift received has to be paid? What force is there in the thing given which compels the recipient to make a return?" *Id.* at 1.

The idea of reciprocity implicit in the answer to the above questions gains social and political significance because in reality there is a deeply rooted concept of cooperation in the folkways of the masses, who "know their own interest and the common interest better than their leaders do." *Id.* at 76. Mauss concludes that reciprocity is the fundamental basis of social order within groups and across group lines. "Societies have progressed in the measure in which they, their sub-groups and their members, have been able to stabilize their contracts and to give, receive and repay. In order to trade, man must first lay down his spear. When that is done he can succeed in exchanging goods and persons not only between clan and clan but between tribe and tribe and between nation and nation, and above all between individuals. It is only then that people can create, can satisfy their interests mutually and define them without recourse to arms. It is in this way that the clan, the tribe and nation have learned—just as in the future the classes and nations and

law. When a claim is made demanding a decisional forum to assert pri-

individuals will learn—how to oppose one another without slaughter and to give without sacrificing themselves to others. That is one of the secrets of their wisdom." *Id.* at 8.

Practical illustrations of Mauss' theme are found in the institutions of potlatch among the American Indians in the Pacific Northwest. The recipient was obligated to take the gift and under an obligation to give something more in return at a potlatch of the receiver. *See id.* at 3-5; P. Druker, *The Potlatch*, in *TRIBAL AND PEASANT ECONOMIES: READINGS IN ECONOMIC ANTHROPOLOGY* 481-93 (G. Dalton ed. 1967).

The modern literature on social exchange theory illustrates two basic approaches that seem to represent an artificial polarization of the key ideas. The first perspective influenced by Mauss and Durkheim, emphasized ideas of social solidarity and sees exchange as a function of social structure. *See generally* P. Ekeh, *SOCIAL EXCHANGE THEORY: THE TWO TRADITIONS* (1974). The second basic approach argues for a more individualistic theory of social exchange. *See generally* P. Blau, *EXCHANGE AND POWER IN SOCIAL LIFE* (1967). These two basic approaches are mirrored in the conflicts about conflict of laws theory. The most important dimension of this conflict is reflected in the mediation between state power and individual rights (party autonomy) in the making and application of law across state lines.

Because of the importance of the concept of reciprocity to social process, some theorists regard reciprocal tolerances as representing a preemptory norm of social process. According to Alan Gouldner, reciprocity is "a universal moral demand." Gouldner, *The Norm of Reciprocity*, 25 *AM. SOC. REV.* 161-78 (1960). *Cf.* Trivers, *The Evolution of Reciprocal Altruism*, 46 *Q. REV. BIOLOGY* 37, 37-57 (1971). A form of reciprocity reposes in the doctrine of similarity of the conditions of liability. *See, e.g.,* The Halley, 16 *Eng. Rep.* 514 (1868). The doctrine was rejected in the United States by Justice Cardozo in *Loucks v. Standard Oil Co. of New York*, 224 *N.Y.* 99, 120 *N.E.* 198 (1918).

The doctrine of *renvoi*, also incorporating policies *implicit* in reciprocity, has had an active life in PIL. *See* *Richards v. United States*, 369 *U.S.* 1 (1961); *University of Chicago v. Dater*, 277 *Mich.* 658, 270 *N.W.* 175 (1936); *In re Schneider's Estate*, 198 *Misc.* 1017, 96 *N.Y.S.2d* 652 (Sur. Ct.), *aff'd on rehearing*, 100 *N.Y.S.2d* 371 (1950). *See also* P. North, *supra* note 1, at 61-76; Griswold, *Renvoi Revisited*, 51 *HARV. L. REV.* 1165 (1938). The role of reciprocity in the institutions of private law is ubiquitous. It forms the basis of certain species of fiduciary relationships, the mortgagor-mortgagee relationship, trusts and the equity of redemption. Reciprocity permeates the "original" basis of contracts in Germanic and Roman Law. *See* Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 *Nw. U. L. REV.* 619 (1954). Lenhoff includes many other examples from the domain of Private Law institutions, including examples from such modern fields as Labor Relations Law. Examples of reciprocity in PIL abound, sustained in modern law in part by the myth of the equality of states and in part by conditions of power. *Id.* at 622. Schwarzenberger describes the principle of reciprocity as the foundation not only of international law but indeed of all law. 1 *G. SCHWARZENBERGER, INTERNATIONAL LAW* 121 (1957).

The capacity of reprisal and retaliation under traditional international law is a well established datum and the courts have been sensitive to these features of international legal process. For example, in *Lauritzen v. Larsen*, Justice Jackson speaking for the Court concerning the application of the Jones Act to a foreign seaman, stated the following:

[I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a

mary policy prescribing competence, or to honor the prescribing com-

foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

Lauritzen v. Larsen, 345 U.S. 571, 582 (1953). In the United States the Constitution provides many answers for securing reciprocal tolerances. The Full Faith and Credit Clause, the Privileges and Immunities Clause, and the Due Process and Equal Protection Clauses of the fourteenth amendment all provide a fundamental law predicate to reciprocity. Additionally, there is a domain of state power that enables states within the union to reciprocate or retaliate with respect to interests of a multistate character. See *Starr, Reciprocal and Retaliatory Legislation in the American States*, 21 MINN. L. REV. 371, 372 (1937).

Principles of comity in addition to the prescription implicit in the Full Faith and Credit Clause have a respectable historical pedigree in federal-state PIL. The concept of *comitas gentium* was widely accepted in both theoretical circles as well as in the judicial process of 19th Century America. See *Hilton v. Guyot*, 159 U.S. 113 (1895). Story and Wheaton made principles of reciprocity a major component of their theories. See J. STORY, *supra* note 1; H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* (1936). Federal statutes of the United States provide for international reciprocity in the following ways: reciprocal elimination of duties on tonnage, 46 U.S.C. § 141 (1976); increase of taxes on citizens of countries that impose "burdensome" or discriminatory taxes on our nations, I.R.C. §§ 891, 896 (1976); reciprocal exclusion of earnings derived from foreign aircraft and vessels from the gross income of foreign corporations, I.R.C. § 883 (1976).

State legislation that embodies the idea of interstate reciprocity seeks to deal with questions such as admission of other states' citizenry to professions such as law or accounting, permission to engage in bonding or insurance businesses, and enforcement of support orders or extradition demands. Some states deal directly with alien activity. The Supreme Court considered a California statute in *Clark v. Allen*, 331 U.S. 503 (1947), which provided that nonresident aliens could inherit personal property if a United States citizen had a right to take property in the country where such aliens were inhabitants or citizens. The Court upheld the statute because it did not conflict with any national treaty, despite an incidental effect on foreign affairs. Cf. Justice Douglas' decision in *Zschernig v. Miller*, 389 U.S. 429 (1968) (striking down an Oregon inheritance statute which in part required reciprocity before a nonresident alien could inherit real or personal property. The opinion distinguished *Clark v. Allen*).

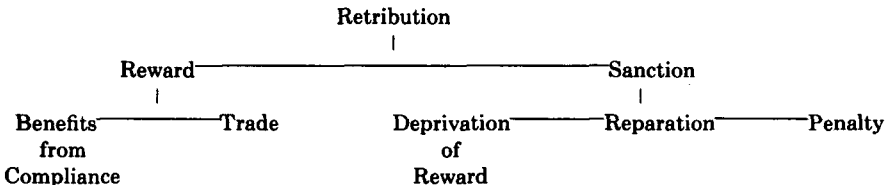
On reciprocity, see Lenhoff, *Reciprocity in Function: A Problem of Conflict of Laws, Constitutional Law and International Law*, 15 U. PITT. L. REV. 44 (1953); Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 N.W.U. L. REV. 619 (1954); Russell, *Fluctuations in Reciprocity*, 1 INT'L & COMP. L.Q. 181 (1952); *Starr, Reciprocal and Retaliatory Legislation in the American States*, 21 Minn. L. Rev. 371 (1937).

The classic study done on the role of reciprocity in American foreign trade is that of Laughlin and Willis, J. LAUGHLIN & H. WILLIS, *RECIPROCITY* (1903). Other early works on reciprocity in the area of international trade include G. BECKETT, *THE RECIPROCAL TRADE AGREEMENTS PROGRAM* (1941); P. BIDWELL, *OUR TRADE WITH BRITAIN: BASES FOR A RECIPROCAL TARIFF AGREEMENT* (1938). Professors Lasswell and Kaplan use the concept of sanction within the framework of the law, science and policy conception of the power process. See H. LASSWELL & A. KAPLAN, *supra* note 32. That is, the conception of sanction policy is seen in terms of both negative and positive sanctions. The objectives of sanction law are formulated as those of prevention, deterrence, restoration, rehabilitation, and reconstruction. See also M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 345-46 (1961).

petence of another state, that claim isolates a complex response by specifically referring to the prescribing function in the decision process.⁷⁶

Community expectations about a decisional response to such a claim would anticipate a policy projection formulated by decisionmakers for communication to a transgroup target audience, including the immediate participants. This would involve all phases of the prescribing process, including: (1) initiation of the process; (2) exploration of potential transgroup facts and policies; (3) projection of policy choices and their formulation as authoritative for the larger community; and (4) communication of prescriptive content and expectations about authority and control.⁷⁷

76. This analysis seeks to explain the relationship between law-making and the conditions of power in a multi-state, multi-national or multi-group world. When the level of analysis shifts to the multinational or transnational context, the problem of law and power becomes acute. Theorists who define law in terms of sanctions often use the notion of "sanction" as a synonym for "power," and view the concept of sanction and, therefore, power in terms of the idea of "negative sanction." The more refined version of the sanction theory and the nature of transnational law is based on the capacity for retaliation. In this view, PIL would therefore be based on the notion of vengeance. Cf., W. GOULD & M. BARKUN, *INTERNATIONAL LAW AND THE SOCIAL SCIENCES* (1970). These authors view the idea of retribution as more accurate than either the ideas of retaliation or vengeance, and it is clear that the notion of retribution is closer to the concept of power than they appear to imply. They illustrate the many dimensions of power, viewed here as retribution, as the following indicates:



These writers derive from this model the principle of reciprocity as one of the central ideas of modern international relations. This conclusion is meant to parallel Malinowski's concept of reciprocity as the key principle of law and life in primitive society. See generally MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926). In H. LASSWELL & R. ARENS, *IN DEFENSE OF PUBLIC ORDER: THE EMERGING FIELD OF SANCTION LAW* (1961), the authors have investigated the employment of "intellectual tools" and "modes of practical action" with which to align sanctioning with the ideals of a democratic social order (which is concerned with the individual).

77. See McDougal & Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, 6 *YALE STUDIES IN WORLD PUBLIC ORDER* 249 (1980). The problem of law making in public international law poses an equally difficult problem in the domain of private international law. PIL theorists under the influence of "dualism" have sought to radically dissociate its "law making process" from that of public international law. The objective here was to preserve PIL from the Austinian "non-law" wasteland. To this extent PIL theorists have been more successful than their public international law counterparts. At least PIL has been able to avoid the stigma that it is

The relationship between claimant and decisionmaker in the judicial process is more dynamic than an abstract notion of claim and decision might suggest. Although the concepts of claim, power, decision, and prescription all intersect, each performs distinct functions in a transgroup claim and bear upon the relationship between power and reciprocity. Understanding this interplay in a transgroup context provides the key to understanding the choice of law process, which may be illustrated as follows. The pleadings contain a demand that deference be given to the prescribing competence of another state. These pleadings may be challenged, for example, by a general demurrer or its functional equivalent.⁷⁸ At the instant a preliminary challenge is made to the substantive sufficiency of the pleadings, the decisionmaker's response involves exercising a law-making or prescribing competence of a limited nature. Parenthetically, although the pleadings may also involve motion challenges to the court's jurisdictional or applicative competence, here the only concern is prescribing competence, or choice of law. If the pleadings or the pretrial record survive, there is assurance that decisional weight will be accorded the reference to "foreign law."

mere "positive morality." This has had the disadvantage, however, that less theorizing has been done about the "prescriptive" basis of PIL and its relationship to public international law.

Once it is conceded that law-making across state and national lines is law-making, it then becomes totally untenable to assume that the vast aggregate outcomes of PIL is not part of an extremely complex prescribing process in the international legal arena. The plain fact is that no recorded theorist has ever said that PIL law is not law. The private and public spheres of the international legal arena share the same conceptual underpinnings and the same conditions of law-making of the international system, so that a fruitful and realistic focus of inquiry about the prescribing process may be established. Indeed, the great intellectual challenge has been to accurately describe and explain the nature of law-making in the international legal system as a whole so that those charged with the making and application of law in what is conventionally called the PIL arena might better appreciate both the potential and the limitations of what they do. Reisman and McDougal see all law-making in terms of communication strategy designed to instill three basic expectations about the process of prescription. These co-axial expectations may be set forth as follows:

(Policy Content)
 Communicators (Authority Signal) ————— Target Audience
 (Control Intention)

See also W.M. Reisman, *International Law Making: A Process of Communication*, Lasswell Memorial Lecture (delivered at the Annual Meeting of the American Society of International Law, April 24, 1981).

78. FED. R. CIV. P. 12 (b) (6):

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . .

This assurance accommodates a number of low visibility policies that are rationally related to the entire prescription process, and are also vital to the transgroup power process.⁷⁹ If the decisionmaker formally accepts the potential relevancy of foreign law, he makes the foreign law, in effect, a component of the decision process. This preliminary prescriptive outcome has important consequences for the transgroup power process. By giving assurance that the foreign perspective will be a serious component of decision, the decisionmaker avoids both the problem of acquiring effective power to effectuate its decision and the institutionalization of retaliation. This advances transgroup interests in reciprocal tolerances and lays the groundwork for honoring the rational allocation of prescriptive competence across state lines.

A provisional prescriptive outcome that assures decisional weight will be given to the foreign perspective leaves open the question of what the content of the law-making function will actually be for communication to the parties and the transgroup audience. The key issue for decision must therefore focus on the range and quality of decisional indices a decisionmaker utilizes to make transgroup law.⁸⁰

A great many writers have struggled with the choice of law problem and have emerged with some quite unclear formulations of decisional indices, in part, because they were wedded to the dualistic myth of the transnational legal structure. Walter Wheeler Cook provides an example. Cook claimed a court never formally honored foreign law, although practically it did.⁸¹ Paradoxically, he formulated this novel

79. These phases of prescription are generally determined after the pleadings are filed, e.g., motion for judgment on the pleadings, or during, or after discovery, e.g., summary judgment.

80. Compare the formulations of L. POSPISIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* (1971). Pospisil captures the complex accentuations and attenuations of intergroup power relationships in more general terms:

In the long perspective the center of power, of course, is not a static phenomenon. The relative amount of power at the various levels within a society (in the different types of groups of varying inclusiveness) may diminish or increase, with the result that the center of power (defined by the relative amount of control of the various societal segments) may shift its position to another level.

Id. at 118. The number and kinds of legally significant social groupings is never constant. From a PIL perspective these are continuously structured and restructured according to the dynamics and scope (level of exclusivity and inclusivity) of the multiple arenas of decision and the way in which the social and power process is structured in preferred ways by decision outcomes. Pospisil's theoretical formulation on this is weak because he does not clearly connect the notions of "group," "power," and "decision." He states: "The number and types of legal levels in a given society is, of course, not constant." *Id.* at 119. But this inconstancy is not clearly located in the flow of decision itself. This is the weakest analytical aspect of an otherwise brilliant formulation.

81. See W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942).

monument to the juridical fiction on a commitment to superrealism and empirical science. His local law theory runs as follows:

[T]he forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected. The forum thus enforces not a foreign right but a right created by its own law.⁸²

Cook's formulation is incomplete and partly erroneous. The statement makes no clear-cut distinction between the complex phases of the prescribing process; it makes no clear reference to the nexus between the process of claim and threshold decision in the prescription of policy—the phase involving the initiation and exploration of potentially relevant community policy, whether of an exclusive or inclusive character. Cook was indubitably right in identifying the forum as making law; he was wrong in not seeing that the forum, in making and applying law for a more inclusive decisional arena, was transcending the dualistic idea of state sovereignty, which he embraced.

Professor Yntema emerged with a more flexible, if somewhat eclectic, formulation. He was hardly able to avoid Cook's fiction, but his commitment to internationalism led him to perceive that claim, decision, and policy were more complex than the local law theory seemed to concede. Yntema thought a court, in honoring a foreign state's prescribing competence, was doing something that resembled what it thought the other forum might do in similar circumstances.⁸³ He explained this theory in the following manner:

[I]n the last analysis, it is a simple question of convenience and equity, roughly controlled by the traditions of the forum, as to how far a court will, can, or should relax its domestic habits of decision to *give a judgment more or less remotely resembling that which might be secured in the court of another jurisdiction*. The basis of departure is the practice of the forum and the equities of the instant case, and not universal principle or vested right. In the field of conflict of laws, as in other branches of law, the problem is essentially one of the adjust-

82. *Id.* at 20-21.

83. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 478 (1927).

ment of actual interests and not of formal logic.⁸⁴

Yntema also explained PIL in terms of decision. He recognized that decision is often determined by the "adjustment of competing interests" and the "equities of the instant case."⁸⁵ Yet Yntema, for all his urbane internationalism, could not extricate himself from the omnipotence of the dualistic myth. No doubt both Cook and Yntema were on the right track. Their latent or patent commitment to an Austinian-type of dualism, however, prevented them from properly locating the PIL decision in its transnational setting; their seemingly cavalier approach to the procedural features of a lawsuit and the phases of the prescribing process led them to incomplete and partial formulations.

Scelle, on the other hand, has been able to formulate a more appropriate perspective without an elaborate theory of claim or decision:

When the legislator of a state or when national jurisdictions establish rules governing conflicts of laws or conflicts of jurisdictions, they lay down *rules of international law*. . . . [W]hen a national judge delivers a judgment in a case between nationals and foreigners or between foreigners, he ceases to be a national judge and becomes an international judge.⁸⁶

Mr. de B. Katzenbach has declared he would "prefer to conceive all authoritative decisions which affect the international community as international law. . . ." ⁸⁷ These positions readily demonstrate why the

84. *Id.*

85. *Id.*

86. P. JESSUP, *TRANSNATIONAL LAW* 5 (1956).

87. Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 *YALE L.J.* 1987, 2110 (1956). These ideas are also brilliantly illuminated by Lord Mansfield and Lord Stowell in setting out the cultural paradigm for the maritime law of 18th century England. Compare the following per Lord Mansfield:

[B]y the law of nations and treaties every nation is answerable to others for all injuries done, by sea or land, or in fresh water, or in part. Mutual convenience, eternal principles of justice, the wisest regulations of policy, the consent of nations; have established a system of procedure, a code of law, and a court of the trial of a prize. Every country sues in these courts of the others, which are all governed by the same law equally known to each.

Lindo v. Rodney and Another, 2 *Dougl.* 613, 616 (1781). In *In re The Recovery*, 6 *C. Rob.* 341, 348-49, 165 *Eng. Rep.* 955, 958 (1807), Sir W. Scott said:

[I]t is to be recollected that this is a Court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it, is the administration of the law of nations, simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence

Id.

dynamics of claim and decision have a significant bearing on the character of PIL: the various prescriptive phases of domestic decision actually beget transgroup ramifications.

Extrapolating from these positions, the analysis presented here provides a useful framework for clarifying the theoretical basis of PIL. First, one can account for the satisfaction of transstate expectations about law. Second, one can appropriately locate a PIL decision in its transnational context. Third, one can more clearly understand the interconnection between claim and decision and preferred community perspectives.

The pivotal features of this description can now be briefly restated. In traditional nomenclature, a claim for honoring the prescribing competence of a foreign jurisdiction creates a choice of law problem. When processed, such a claim is closely bound up with a preliminary phase of the prescribing process, and here, it performs a distinctive and unique function in the decisionmaking process. It injects into the decision process perspectives and expectations concerning both foreign law and the common interests of the larger society viewed through the lens of an observer. At this level (initiation and exploration of facts and potential policies), due deference is given to perspectives associated with foreign law, since such perspectives create and sustain expectations about deference and reciprocal tolerances where control over claim precipitating events is concurrently or sequentially shared. These perspectives are given "serious" consideration in the prescribing process. The structural parameters of decision, therefore, are more inclusive in character at this phase of the prescribing process, and the shared perspectives evidence a concern for advancing and facilitating the interdependence and interstimulation of relevant groups and states. By making the "foreign perspective" a component of interest of the decision process, the potentials for counterproductive retaliations are minimized.

At this phase of the prescribing process, a decision on the merits would be premature, because due deference cannot be equated with unreasonable deference. In order to establish when deference is due, all of the complex phases of the decision-making process relevant to prescription should be considered. This includes both the choice and formulation of policy projected as authoritative for the relevant communities and the communication of that prescription to the target audience. These are functions that are of extraordinary complexity in a non-PIL case. In the PIL case, a decisionmaker is dealing with a target audience that is more inclusive and is essentially transgroup. Thus, ascertaining expectations about authority and control often demands that a decisionmaker identify with a multitude of perspectives transcending the

parochial. It demands a more sophisticated appreciation of the genesis of public order and of the inclusive and exclusive components that sustain and shape such a concept in preferred ways. In ascertaining due deference, therefore, the first task is to determine what shared expectations concern authority and control. Other prescribing functions would include supplementing ambiguous or partial prescriptions with reference to more generally acknowledged community policies that address value exchanges. This would include the recognition that in a PIL claim, the decisionmaker is accountable to a more inclusive community for the formulation and projection of policy, and he is charged with the management of total policy, in context, for a larger aggregate of interests. In the PIL context, integrating expectations about reciprocal tolerances with basic community policy viewed from the perspective of another becomes a critical decision function.

D. Summary

In the choice of law context, a claim has a dualistic character. It can be both a claim about the allocation of a prescribing competence (a claim to power) and a claim to a value other than power. Transgroup community expectations about the power claim are partially satisfied when the decisionmaker accounts for the exploration of the potential transgroup factual and policy phase of the prescribing function. Ideally, the focus of decision ought to shift from power to the aspect of the claim concerning value allocation, which commands competency over a more inclusive area of concern. Therefore, when a claim is made that a forum seized of a problem honor another group's prescribing competence, major power dimensions must be accounted for in the prescribing process. When these accounts have been squared, the key decision questions posed are as follows: What range of indices should inform a decisionmaker in allocating substantive values across group lines? What goals should inform a decisionmaker in making such a decision? How much creative choice rests in discharging this function? How "should" this choice be responsibly exercised in the creation and recreation of "transgroup" law?

The decision to honor or refuse a claim to prescriptive competence demands some realistic and contextual criteria for choice. An attempt has been made here to set out realistically and comprehensively the broad structural outlines of a PIL paradigm. The viability of such a model depends on its capacity to secure a balanced emphasis between perspectives and operations through time. The value of such a model may be illustrated by posing a simple series of questions: Should a decisionmaker be concerned with results in prescribing choice of law policy? Does his responsibility extend only so far as "meeting the nice-

ties of procedural fairness in context?" Is it the "legitimacy" of the process or the concern for a good result that matters? Is the decisionmaker's prime function the cultivation and structuring of processes dedicated to benign disinterest often leading to institutional indifference, or, is it to be conditioned by an abiding concern for common decency associated with public order and human dignity? In other words, should the framework for choice in PIL solely concern the efficacy of the process, or should it acknowledge the process' latest potentials for structuring the public order in a preferred way?

The theorists mentioned above have been forced to recognize the inevitability of choice in structuring the distribution of values. This problem has stimulated the invention of a broader range of intellectual tasks within the confines of the existent paradigm, and it has compelled a formulation of some preferred features of social process, however poorly distilled or articulated. It is therefore necessary to develop a comprehensive and realistic approach to PIL problems and systematically specify the salient intellectual tasks relevant to that end.

If the phases of the prescribing process involving claim and decision are an accurate estimation of the dynamics of decision in choice of law, the implications for the existing paradigm of PIL are highly significant. The prevailing myth operates from a dualistic-positivistic perspective. An *a priori* distinction is, therefore, drawn between private and public international law.⁸⁸ The rules of PIL are located structurally as rules of positive law of various state participants who are deemed to be near exclusive actors or sovereigns, in public international law. This structural distinction is irrelevant to a policy-oriented perspective because it has no relevance to policy outcomes. By contrast, this article deems both public and private international law as complementary and indispensable parts of a more comprehensive pro-

88. "That part of English law known as Private International Law comes into operation whenever the court is seized of a suit that contains a foreign element." P. NORTH, *supra* note 1, at 3. "Private International Law is not the same in all countries. There is no one system that can claim universal recognition . . ." *Id.* at 9. Cheshire provides the classical positivist-formalist definition of public international law. He argues that public international law deals essentially with the relations of competing sovereign states whereas PIL disputes are really private in character. Thus PIL consists of binding rules "imposed" on all civilized states whereas each state has its own internal system for handling private problems impacting transnationally. *Id.* at 12. Cheshire does, however, concede that PIL and public international law are not unrelated. Some principles of law such as the maxims, *audi alteram partem* and *ut res magis valeat quam pereat* are common to both; some rules of PIL, as for example, the doctrine of the law of contract, are adopted by a court in the settlement of a dispute between sovereign states, equally, some rules of public international law are applied by a municipal court when seized of a case containing a foreign element. *Id.* at 13.

cess of authoritative decision.⁸⁹ Thus, as before mentioned, the standards used to appraise past theories about PIL are basically the same as those used to evaluate theories about international law in general.⁹⁰

E. Towards a Configurative Theory about PIL

Past theories of PIL have been characterized by both ultra-conceptualist perspectives at the expense of social facts and nominalism rooted in microdetailed particulars, but lacking in theoretical sophistication. The configurative approach aspires to preempt and go beyond the perspectives of these orientations in a more comprehensive and realistic framework.

A configurative approach must, therefore, reflect the following: First, it must be contextual and comprehensive, in that all relevant problems must be located in the context of an appropriate phase of the social process. Second, it must be problem-oriented and rooted in social facts. Third, a set of intellectual tasks for the formulation of issues and the making and application of policy must be performed.⁹¹

A policy-science approach to PIL must provide a comprehensive analytic framework which includes "a conceptual technique for delineating the relevant aspects for power and policy of any interpersonal

89. Consider Judge Jessup's statement that:

Without suggesting that existence of "world law" the problem can be seen to be whether there is any unity in the international interests of all members of the international society of states, as to induct cooperation in law enforcement without strict adherence to what may be outmoded precepts of private international law.

P. JESSUP, *THE PRESENT STATE OF INTERNATIONAL LAW* 341 (1973). What Judge Jessup urges is, in effect, the construction of a new paradigm in one's perceptions about public international law and PIL; a reconceptualization of the whole institutional superstructure. Thus, says Jessup, "[T]he basic thesis of a plea for the evolution of a transnational law is the desirability of eliminating distinctions between different branches of law which have been compartmentalized in judicial practice." *Id.* at 342.

90. A realistic and comprehensive theory about PIL must essentially be contextual, problem-oriented, and goal guided. Additionally, it must be technically informed by the multiple methodologies of all relevant knowledge generating disciplines required to guide and inform decision. In short, it must be configurative. As has been suggested, the context of the world social process is diffuse, the world process of effecting power is in disarray, and constitutive and public order decisions are often highly decentralized. These features of context bear witness to both pluralistic and universalizing characteristics of the relevant context from which PIL outcomes emerge. To use Yntema's phrase, it is "unity in diversity." The events which characterize the processes of claim and decision, when stripped of the formal categories of symbolic rectitude and disinterest, are often reflective of the complex context from which they arise. How a decisionmaker and scholar orients himself to the social process is a crucial feature of the factual context. Cf. McDougal, Lasswell & Reisman, *supra* note 44, at 188.

91. *Id.* at 196.

interaction,"⁹² since decision shapes the nature of the social process in desirable and sometimes undesirable ways. The procedure followed is that of locating a decision, i.e., "choosing the phase at which a sequence of interactions appear to culminate in choices enforced by sanctions and deprivation of indulgence."⁹³ The great innovation of the policy-science school has been the invention of the phases analysis designed to cover every salient aspect of behavior pertinent to the process of claim formulation as well as of decision.⁹⁴

F. Criteria for Evaluating Past Theories About PIL

Given that PIL is a complementary and indispensable part of the world process of authoritative decision, the standards by which past theories can be meaningfully evaluated include essentially those criteria that other policy scientists have used to assess past theories of international law. These criteria include the following: (1) the establishment and maintenance of a clear observational standpoint; (2) the articulation of a sufficiently comprehensive and realistic focus of inquiry; (3) the specification and performance of all relevant intellectual tasks in context; and (4) the clarification of basic community policy and postulation of preferred public order goals.⁹⁵

1. The Observational Standpoint

The location of an appropriate observational standpoint⁹⁶ for the discharge of the intellectual tasks associated with scholarship in international law is gaining increasing acceptance.⁹⁷ Clarity in observational standpoint, it is submitted, lends greater precision to what is being studied, how it is to be studied and the purposes of the study.

One of the most difficult issues of contemporary jurisprudence is the problem of the standpoints of the different participants involved in the process. From the perspective of the policy scientist, no human being can claim to be outside of the social process. The scholar is no

92. *Id.* at 198.

93. *Id.* This means that PIL or any particular PIL outcome ought to be seen in relation to the entire social process. Hence, the importance of an adequate form of inquiry.

94. See generally McDougal, Lasswell & Chen, *Human Rights and World Public Order: Human Rights in Comprehensive Context*, 72 NW. U. L. REV. 227 (1977).

95. See McDougal, Lasswell & Reisman, *supra* note 44, at 198. See also Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 379-94 (1971).

96. See McDougal, Lasswell & Reisman, *supra* note 44, at 199.

97. See generally Falk, *On Treaty Interpretation and the New Haven Approach*, 8 VA. J. INT'L L. 330 (1968); Gottlieb, *The Conceptual World of the Yale School of International Law*, 21 WORLD POL. 109 (1963); Young, *International Law and Social Science: The Contribution of Myres McDougal*, 66 AM. J. INT'L L. 60 (1972).

exception. Within the social process the scholar performs a unique function in the pursuit of enlightenment; he develops and adumbrates intelligence about the social process, and promotes the perspectives of a special interest group. Like the work of all other international law scholars, the enlightenment process for the PIL scholar must cover a broad arena of social interaction.

It is submitted that the scholar occupies an extraordinarily important position in the PIL framework. The enlightenment⁹⁸ the PIL scholars have communicated has carried enormous weight in power arenas with direct impacts on the ordering of the social process. For these reasons, it is recommended that a scholar's identification in PIL be no different in scope or intensity than that recommended for other international law scholars.⁹⁹

Since the PIL scholar studies in a context where more exclusive and parochial perspectives can, and often do, become a tempting predisposition, the important preliminary task of the scholar is to develop his pattern of primary identification. Realistically, this identification should be with the whole of mankind because the problems, claims, decisions, preferred outcomes, and indeed, the whole PIL process deals with a comprehensive flow of value exchanges. These exchanges reflect the primary demands of people in society.¹⁰⁰ They encapsulate a society comprising a complex, pluralistic amalgam of territorial and functional groups and other modalities of affiliation. In the contemporary PIL arena, the patterns of interaction of all participants reflect a growing sense of interdetermination and interdependence in the shaping and sharing of all important values. The demands for global integration and respect of diversity in different societies are two "dominant features of modern culture."¹⁰¹ Therefore, it is evident that the scholar who identifies completely with a particular local law or social group to the exclusion of others, brings a parochial vision to a context which realistically covers mankind.

The distinctive limitations inherent in the traditional paradigm of PIL have created a unique and important role for the scholar. PIL is a

98. See McDougal, Lasswell & Reisman, *The Intelligence Function and World Public Order*, 46 TEMP. L.Q. 365 *passim* (1973). "Intelligence is a critical function at all levels of decision-making, yet its very ubiquity seems to have obscured it from visibility to scholarly inquiry." *Id.* at 366. "The importance of intelligence for goal realization at the community level is readily observable in every value process." *Id.* "Broadly conceived, intelligence is concerned with knowledge: statements and propositions confirmed by experience, or to which a degree of probability can be assigned." *Id.* at 367.

99. See McDougal, Lasswell & Reisman, *supra* note 44, at 199-200.

100. See generally *supra* note 7.

101. Yntema, *The Historic Basis of Private International Law*, 2 AM. J. COMP. L. 297, 298 (1953).

scholar-made and scholar-dominated field that has, on occasion, attracted the attention and philosophical sensibilities of brilliant, active decisionmakers. Because the PIL scholar has been so influential in the intelligence and promotion functions, there has been a distinct tendency to identify closely with decisionmakers, to concentrate much intellectual energy and material resources developing models of rather than theories about PIL.

a. Jurisprudential implications of the observational standpoint and PIL

The basic problem posed by standpoint is disarmingly simple in the area of jurisprudence: What influence does the standpoint of the scholar have on the perspective communicated to a target audience? For many scholars, the issue of standpoint is not deemed significant. The perspective assumed by such writers is that if a phenomenon exists objectively, that is to say, if it is totally extrinsic to the self, what is communicated is simply, "what is." If a fundamental jurisprudential postulate viewed law as a closed, logical system, the system would require no special complication of standpoint other than technical skill in description. If, however, law is viewed in behavioral terms, the problem of standpoint becomes critical. Consider the following insight of the late Professor Lasswell:

Now it is impossible to abolish uncertainty by the refinement of retrospective observations, by the accumulation of historical detail, by the application of precision methods to elapsed events; the crucial test of adequate analysis is nothing less than the future verification of the insight into the nature of the master configuration against which details are constructed. Each specific interpretation is subject to redefinition as the structural potentialities of the future become actualized in the past and present of participant observers. The analyst moves between the contemplation of detail and of configuration, knowing that the soundness of the result is an act of creative orientation rather than of automatic projection. The search for precision in the routines of the past must be constantly chastened and given relevance and direction by reference to the task of self-orientation which is the goal of analysis.¹⁰²

The nature of standpoint in discourse on jurisprudence is a com-

102. H. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* 17 (1935).

plex and convoluted affair. Holmes suggested an aspect of significance in standpoint when he implicitly recommended that legal education would benefit when students are sensitized to the "bad man's" perspective.¹⁰³ An additional significant feature of the bad man's perspective is that it was meant to clarify legally relevant behavior, because we can use his perspective to "wash law in cynical acid."¹⁰⁴ The standpoint of the bad man enables one to separate law from morality. It should be remembered that "prediction" for the bad man is not the same thing as prediction for the scientific observer. The bad man wants prediction because he is egocentric, and the value premises of this kind of egocentricity mirror the moral basis of the laissez-faire man. The bad man is, indeed, "Herbert Spencer." An element of confusion seems to emerge when we read Holmes as saying the prophecies of what judges in fact do, is law, because this statement derives its core meaning from the context and standpoint of the bad man. Holmes' bad man is, of course, a claimant—an adverse party in the context of litigation. The bad man's predictions are those of one actively involved in influencing the system.

The same article by Holmes gives us a different standpoint, one that is olympian if not magisterial. Here Holmes assumes a position that can only be described as being "outside" or "above" the system. Holmes examines conditions that influence judge-made law: logic, historical perspective, jurisprudence and science. These comments are *about* law, and the standpoint is that of an observer. The observer's main impact on what he purports to describe and explain is a function of description and explanation. This is the extent to which this standpoint impacts on the legal process.

It is unclear whether the position taken by many legal realists in describing law as a function of judicial behavior, or more generally of official behavior, was from the standpoint of the bad man or the observer. The more sophisticated realists, however, entertained no doubt about the matter. Their rule and fact skepticism were conditioned by a perspective "external" to the system. This perspective was avowedly "scientific." The observer in law was much the same as the anthropologist's perspective in that discipline. Arnold described it colorfully as the standpoint of the little man from Mars.¹⁰⁵ The important point here is that our Martian friend's statements about earth-law are pre-

103. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

104. *Id.* at 462.

105. See generally T. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937); T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935). See also Lasswell & McDougal, *Trends in Theories About Law: Maintaining Observational Standpoint and Delimiting the Focus of Inquiry*, 8 U. TOL. L. REV. 1, 6 (1976).

cisely that: statements *about* earth-law.

Professor H.L.A. Hart seeks to use the "ordinary language" analysis identified principally with J.L. Austin to explain the nature of law-conditioned communication.¹⁰⁶ One of the questions Hart seeks to explain is the meaning of words like "right" or "duty." Hart explores the meaning of statements like "A has a right to be paid £10 by B" in terms of his well-known game analogy.¹⁰⁷ Such statements "silently" assume major contextual features. Hence, to say, "He is out," silently assumes the existence of rules and that decisions or claims are made with reference to these rules. But, says Hart, the statement: "He is out" is "not a statement *about* the rules to the effect that they will be enforced or acted on in a given case nor any other kind of statement *about* them."¹⁰⁸ Hart then concludes that

the analysis of statements of rights and duties as predictions ignores these distinctions, yet it is just as erroneous to say that "A has a right" is a prediction that the court or official will treat A in a certain way (or in the game analogy). . . . No doubt when someone has a legal right a corresponding prediction will normally be justified, but this should not lead us to identify two quite different forms of statement.¹⁰⁹

The fundamental point that Hart is trying to make is that statements like "X has a right to be paid," or, drawing from the game analogy, "He is out," are expressions that presuppose, from the point of view of the ordinary user of language, the pre-existence of prescriptions, which he technically designates "rules." In ordinary language analysis, these expressions "appeal to rules to make claims, or give decisions under them"¹¹⁰ Such statements are not "about rules to the effect that they will be enforced or acted on in a given case nor any other kind of statement about them."¹¹¹ This criticism is a fundamental attack on American Legal Realism for it seeks to show that from the perspective of ordinary language analysis, statements about law cannot be meaningful to the ordinary user of language because the ordinary user of language for this purpose *must* presuppose the pre-existence of legal rules. There is an obvious "chicken and egg problem" regarding the postulation of a pre-existing set of rules, assumed by the

106. J. AUSTIN, *PHILOSOPHICAL PAPERS* 35-37 (1961); Hart, *Definition and Theory in Jurisprudence*, 70 L.Q.REV. 37, 38 (1954).

107. See Hart, *supra* note 106, at 42.

108. *Id.* at 43.

109. *Id.* at 42.

110. *Id.*

111. *Id.*

ordinary language communicator. A person may truly believe that such "rules" exist, but this cannot deny the utility of a scientific observer describing the ordinary language communicator's belief that there must be a structure of rules to govern his condition of being or indeed, that there must be a God who does so. Whether, of course, one can show from an observer's perspective that the rules scientifically exist, or that God is not dead, is a question of a different order, for this question seeks to advance understanding and punctuate the misconceptions of the ordinary user of language and his understanding of phenomena as expressed through language.

The idea of prediction that Hart seems to be attacking, it should be noted, is the prediction associated with the "bad man." The bad man is a participant and not an observer. The observer's statements about law have their fundamental basis in the description of behavior; forecasting into the future reflects inferences drawn from the conditions that influence behavior. In this view, pre-existing myths like the assumption "rules exist" may, of course, influence behavior as much as a hurricane or earthquake.

The fundamental point Hart attacks by making this distinction is that law conditioned communication must be shaped by ordinary language analysis, for only through such a lens can law approximate the certitude and stability in expectation that the ordinary citizen anticipates. A fundamental criticism of this position is that ordinary language would seem to deny the generation of a "metalanguage," a scientific language that would explain legal phenomena more accurately and realistically than would the ordinary language symbols of the lay person. The language of science is meant to generate new knowledge, to create concepts to account for change in the phenomenal world. It would seem that the ordinary language analyst would deny the creation of organizing concepts and methodologies that might scientifically explore law as a function of behavior rather than a function of assumed rules of uncertain origin and uncertain content.

It may be fairly said that the limitations existing in theories of PIL are a reflection of the inadequacies of conventional jurisprudence in predominant legal cultures. The problem of standpoint in PIL contains other difficulties too.¹¹² While working within the confines of a "theory of law," PIL doctrine seemed to effect a metalanguage within the confines of the prevailing juridical myth. Indeed, it might be more accurate to describe the symbology of PIL as a legal subculture with

112. On the functions of the observational standpoint and the functional designation of role structure (observer, participant-observer, participant), see H. LASSWELL, *THE ANALYSIS OF POLITICAL BEHAVIOR* 261-78 (1948).

distinctively unique lexical qualities. According to the late Dean Prosser: "The realm of conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors, who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it."¹¹³ Prosser did not explain why PIL lent itself to a "strange and incomprehensible jargon." The answer is not easy; it seems rooted in the nature of the subject.

The typical PIL problem has never provided an easy fit for preexisting juridical models of law. In fact, the metalanguage about PIL may have been a necessary adjunct to a formal myth that had to account for power realities transcending discrete groups in a more inclusive frame. These efforts represent the tentative gropings for a metalanguage *about*, rather than *of*, law and illustrate how scholars were searching for a legal paradigm to account for the transgroup allocation of values.¹¹⁴ PIL has been the testing ground of legal theory. In practical terms, PIL seems to have exhausted the ability of traditional legal theories to answer the question of what is a good reason for an authoritative decision where transgroup power variables are salient. This makes the distinction between a theory *of* and a theory *about* law even more crucial.

The problem is a pronounced one in PIL. The active decisionmaker has had to live with his outcomes and has sought guidance from or reliance on metalegal symbols. The scholar has creatively sought to refine and expand them. The utility of a theory about law, therefore, has been most directly relevant to both scholars and decisionmakers in the PIL framework.¹¹⁵ Hence, there has been an extraordinary convergence of perspectives about PIL between active decisionmakers and scholars¹¹⁶ and this has had both a positive and negative influence on the PIL framework. Active decisionmakers have been receptive to the contributions of scholars; scholars, however, feel-

113. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

114. See generally *supra* notes 1-2.

115. But see Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 376 (1971). This article notes that:

[W]hat the scholarly observer requires is a theory *about* law, designed to facilitate performance of the pertinent tasks in inquiry about decision, as distinguished from the theories of law which are employed by decision makers and others for obtaining and justifying outcomes within the decision process and are, thus, among the variables about which the scholar seeks enlightenment. Good theory about law may of course on occasion be found useful by decision-makers and, hence, also become in the course of time a part of theories of law

Id.

116. *Id.*

ing perhaps that their work is influential in the practical arenas of decision, have been reluctant to be more innovative in developing the PIL framework in more social scientific terms. This point lends weight to the importance of the observational standpoint in this area.

Fully aware that in different contexts human beings assume multiple identifications, emphasis should be given to the distinction between the scholar and the active decisionmaker. Role inversions take place all the time, and in diverse contexts, multiple identifications can be easily manipulated to accommodate the diverse role-demands implicit in community expectations and emerging public order perspectives. The scholar's role epitomizes the pursuit of enlightenment as a scope value,¹¹⁷ although the outcomes of the enlightenment process can be used to realize other value-based outcomes as well. Thus, the "intelligence" and "promotion" functions are acknowledged in most scholarly efforts in the PIL context, and have had a direct impact upon decision and an indirect impact upon the structuring of the global social process.¹¹⁸

The decisionmaker occupies a role specialized to power and authority; by deciding cases he makes and applies policy. What he does is critical to the allocation of all values in society. In theory, the difference between the standpoint of the scholarly observer and the active decisionmaker in PIL is relatively clear. The scholar observes, records, and recommends while the decisionmaker adjudicates and decides. This does not mean, however, that both decisionmaker and scholar are not part of a social process. It does mean that the scholar must be explicit about his "own" identifications, and his "own" objectives.

The conditions that have served to reinforce confusions about developing and maintaining a clear observational standpoint for the scholarly focus are as follows: First, PIL began as a university-centered subject established by the early Italian glossators.¹¹⁹ University-based scholarship in PIL can be traced consistently through the continental legal tradition which remains itself, to a large extent, university centered. Leading common law figures in the early development of conflict of laws borrowed heavily from this scholarly tradition,¹²⁰ which is even

117. *Id.*

118. For a discussion of the intelligence function, see McDougal, Lasswell & Reisman, *The Intelligence Function and World Public Order*, 46 *TEMPLE L.Q.* 365 (1973); Lasswell, *Research in Policy Analysis: The Intelligence and Appraisal Functions*, in 6 *HANDBOOK OF POLITICAL SCIENCE* 1-22 (F. Greenstein & N. Polsby ed. 1975).

On the promoting function, see M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 256-61 (1980).

119. See *supra* note 3 (reviewing how the scholarly tradition has shaped the conflicts of law from the post-glossators of the thirteenth century through leading modern American and foreign scholarship).

120. See E. RABEL, *CONFLICT OF LAWS* 7-8 (2d ed. 1958). "The territorial realm of the

more important today. The second salient condition relates to the extraordinary complexity of the PIL problem, which usually involves a multiplicity of both group perspectives and details about social processes. It is certainly no exaggeration to say that theories of law stand or fall on their capacity to account for the PIL problem. The third reason relates to the second. Scholastic preemption of the field, due to the complexity of the PIL problem, has been further accentuated because scholars are removed from the process of decision and thereby insulated from the power complexities of transstate decision. Scholars are not pressed to make decisions within a limited time frame, or within the confines of a power process that defines a range of complementary expectations, which is not always free from parochialism. Scholars in PIL have had the advantages of a contemplative, rather than action-oriented, milieu. Moreover, they have been united in Europe by a common scholar's language (Latin), by a relatively common universalistic set of legal symbols from the Roman-Italian legal culture, and a common core of religious inspired myth associated with ecclesiastical universalism.

The cross-cultural perspectives about PIL, transcending the more homogeneous and perhaps culture-bound Eurocentric reference frame, demand that the scholar heed the venerable Socratic maxim: "Know thyself." The plea is for intellectual honesty and candor and the method recommended is self-analysis. This method is particularly apt for the scholar in establishing a procedure which can account for the problems of culture, class, personality, and crisis in the framing of the primary "I" and the contingent "we." In short, to be effective, the scholar in this field must clarify just who he is and what his objectives are.

2. Delimitation of the Focus of Inquiry: Global and Cross-Cultural Aspects of Social Process

PIL problems involve cross-group and cross-cultural perspectives in ostensible conflict. The model of social process, in which group dynamics associated with consociative characteristics are given promi-

doctrines of the postglossators exceeded even the boundaries within which the canon and Roman laws were received These doctrines, as accepted and transformed by eminent scholars in France and Holland during the sixteenth and seventeenth centuries, gained recognition in England and in the United States." *Id.* at 7. Joseph Story's treatise "contributed to the continuation . . . of an internationally-minded school on the European Continent." *Id.* Germany's greatest jurist, Friedrich Carl von Savigny "established the fundaments of modern conflicts law The international conception of 'international private law' was adopted by Foelix (1843) in France, . . . the Italian Fiore (1869), the Swiss Brocher (1871), and by almost all outstanding authors" *Id.* at 8.

nence, must be comprehensive enough to encapsulate every significant instance of cultural differentiation relevant to the decision-making process. The theory should be useful in identifying and characterizing, for decisions, all functional equivalents and disequivalents in the diverse cross-group, cross-cultural institutions (or patterns of practice relevant to) in PIL. Consequently, such a theory must be contextual in order to relate the impact of all value diffusions to the larger, more comprehensive process of global interaction. This means that there must be an explicit means for recognition of the facts of social interaction in which value exchanges occur as an ongoing feature of the PIL frame, and there must be an appreciation of the range of global participants and participant-community structures through which value exchanges occur. Such a description would seek to adumbrate the functional reach of each relevant actor, and from an observer's perspective, to limit that reach according to the *real* value priorities of each affected participant or participant-group. It is submitted that such a description can be optimally comprehensive and realistically specific when described through a policy science phase analysis of the global social process which stresses the following: who the component actors are; what their perspectives are; what base values they have access to; what operative modalities and practices specialized to various value processes exist or can be structured to accommodate the perspectives of community participants; what outcomes and what effects, with what results for the aggregate and particular shaping and sharing of all demanded values, result from this process.

3. Comprehensive Model of Authoritative Decision in PIL

Certain structural-policy particulars that characterize the PIL decision context have been set forth. It has been urged that, like international law in general, the PIL decision process may be seen as an indispensable and complementary part of the more comprehensive world process of authoritative decision transcending the boundaries of particular territorial communities, which peoples of the world establish and maintain for the purpose of clarifying and implementing common interests. The essential ancillary features of decision in this context may be set out as follows:

a. A balanced emphasis between perspectives and operations

Perspectives include identifications, demands, and expectations that frame the parameters of choice. Operations refer to the choices that are factually made in shaping the allocation of value indulgences or deprivations across group lines. A balanced focus in PIL between

perspectives and operations requires realism. This principle demands that the consequences of decision be considered in factual rather than formal terms. One of the chief flaws of past theory in PIL has been a congenital disjunction between perspectives and operations.

b. Clarity in conception of authority and control

The dynamics of control and authority in PIL have already been alluded to. It might be emphasized that the conception of law developed here incorporates, upon a continuum, the elements of coercion and persuasion. It incorporates, in effect, the elements of authority and control. The empirical references to these notions are to be located in the expectations about authority and control that include, in each PIL context, a plurality of discrete groups and individual actors.

c. Classification of decision: public order, constitutive, civic order

The distinctions maintained here serve essentially analytical purposes which are sustained by the clarity these distinctions provide for policy-making and policy-application. *Constitutive* decisions deal with the establishment and efficacy of the entire decision process itself. Decisions vindicating outcomes that concern themselves mainly with the efficacy of each phase of the decision-making process are thus identified as constitutive decisions.

Public order decisions establish, design, and redesign the protected and specialized features of all value processes. These decisions emerge continuously from the constitutive process.

The *civic order* arena involves decisions that concern a more intensive interaction between the constitutive process and certain phases of each value process, power over which is presumptively allocated to the individual's management capacities. Here community-sanctioning policy is characterized by its relative mildness. The civic order domain is an arena in which a high frequency of primary group interaction occurs and which incorporates significant features of the affection process. These are of growing significance for PIL and represent an important technique for the resolution of choice of law problems as they resort to inclusive community policy of a peremptory nature.

4. Performance of the Intellectual Tasks

Five intellectual tasks have been referred to as indispensable to a viable doctrine and method about the PIL framework.¹²¹ These tasks

121. See M. McDUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 91 (1980).

bear some repetition: (a) goal clarification; (b) description of past trends; (c) conditions (environmental and predispositional); (d) projection of future trends; and (e) appraisal and recommendations.

5. Postulation of Fundamental Goals of a Global Public Order

While the importance of maintaining an appropriate observational standpoint for discharging the scholarly function has been stressed, the outcomes of scholarly inquiry are never neutral. The clarity or obfuscation a scholar disposes on social process has unavoidable impacts on society. There is no escaping the responsibility for one's work, and this imposes an obligation upon the scholar. Indeed, intellectual honesty demands at least that the scholar make explicit the public order preferences latent or subdued in his conscious or preconscious. A scholar working in PIL deals with an extensive and inclusive universe. He has a unique opportunity to recommend preferences that he might morally pride himself in as a responsible citizen of a larger community. Given the burdens and potentials demanded of scholarly choice, an intellectually honest scholar must face the following insistent self-scrutiny: What fundamental social goals do I, as a responsible citizen of a larger commonwealth of mankind, consciously recommend to other equally responsible citizens as the primary postulates of a world public order? The recommended postulation here envisioned is one that embraces the notion "optimal justice." It is premised on the assumption that law should be seen from a practically good rather than a practically bad man's point of view. The postulation recommended as the overriding consideration of law and legal process is the optimal shaping and sharing of all demanded values consistent with a public order of human dignity.

III. TRENDS IN PAST THEORIES OF OR ABOUT PIL

A. *The Statutists*

During the Eurocentric Dark Ages¹²² two important conditions appear to have influenced PIL trends. First, the allocation of controlling competencies in a transgroup setting seems to have been determined by the *lex originis*.¹²³ A Frank thus remained a Frank wherever he went, and this was thought to be universally accepted. Second, emergent social conditions began favoring the consolidation of bases of

122. The period encapsuled in this time frame allegedly dates from the sixth to the eleventh centuries. According to Wolf, "[n]o theory of Private International Law was developed under the Barbarian law." M. WOLF, *supra* note 2, at 21.

123. *Id.* "This became a universal principle." *Id.*

power according to the control of land by territorial elites. Thus the Frankish "capitularia" are described as being "territorial in character, not personal."¹²⁴ As territorial bases of power became more consolidated, the spatial reach of community policy based on the control of land began to replace "the law of the person."¹²⁵ It should be noted that these developments did not trench upon the outlines of the prevailing juridical paradigm, which was structured according to the predominant myth of the period: canonical catholic universalism.

For the above stated reasons, the development of a PIL paradigm from the eleventh century onward, however crude, represents no mean achievement. This achievement we owe to the statutists in Italian universities, who appear to have reached an intellectual peak in the 13th century. Outstanding among the Italian statutists for the development of PIL were Aldricus¹²⁶ and Bartolus.¹²⁷ These statutists and others formalized and laid the foundations for a modernist PIL paradigm.¹²⁸

The primary contribution of the statutists and their successors was their ability to structure a durable myth system with an operative symbology; this system provided a useful technique for the legitimization of transgroup perspectives. They provided the essential features of a doctrine that enabled decisionmakers to structure a transgroup social

124. *Id.* The first deviations from the *lex originis* were, paradoxically, in the direction of individual liberty, rather than feudal status. Parties were asked not what their primary political-social identifications had been, but what they wished them to be. Wolf sees this as one of the earliest examples of party autonomy over choice of law. Under Frankish law the King's *Capitularia* were of a territorial nature. During this period, tribal laws continued to remain in force. This gradually gave rise to the problem, initiated by the multiplicity of tribal laws, of which law should govern legal relationships containing a foreign element. The *lex solutionis* was the *lex originis*. See P. KALENSKY, *supra* note 65, at 49.

125. M. WOLF, *supra* note 2, at 21.

126. It is thought that he first raised the problem of the allocation of prescribing competencies involving a plurality of bodies politic in the 12th century. *Id.* at 22.

127. Bartolus de Saxoferrato (1314-1357) was, of course, a post-glossator. J. BEALE, *supra* note 1, at 25. According to Beale, we owe Bartolus "the entire credit for discovering and stating a body of principle on the conflict of laws . . ." *Id.* at 26. See also M. WOLF, *supra* note 2, at 24-26.

128. The model itself emerged conceptually from positing the following kind of problem: "*Quareritur si homines diversarum provinciarum quae diversas habent consuetudines sub uno eodemque indice litigant, utram earum . . . index sequi debeat.*" M. WOLF, *supra* note 2, at 22.

Aldricus' solution to the PIL problem postulated a naive faith that a "better" rule could be distilled by those experienced in decision. His theory does have a contemporary "ring." The formulation carries with it the following implication—apply the prescription that most approximates inclusive standard—or to use the words of the Magister: "*potior et utilior; debete enim iudicare secundum quod melius ei visum fuerit.*" *Id.* Here the inclusive standard is measured by that which is "better and more useful." *Id.*

process. Patterns of reciprocity and deference became a major expectation about decisions implicating more than a single group in this social process.

Through their system of classifications, the statutists sought to provide a metalanguage about PIL, a symbol system through which transgroup perspectives might be frequently honored. In short, they sought to establish a transgroup authority myth primarily outside of the power process. This was done without consciously establishing the standpoint of the disengaged observer, although their "scholastic" orientation was a useful adjunct to maintaining some sort of a functional distance between observer and participant. In addition, the rediscovery of Roman law served to reinforce a more inclusive pattern of identification in the development of a framework for transgroup law.

Although there was a clear-cut consciousness of the needs and priorities for a broader concept of social process, the statutists' style was much more formalistic. Priority was given to the classification of statutes rather than to the characterization of claims. Thus, the theory of PIL that ultimately emerged sought to establish a distinction between decision and the comprehensive character of the social process in which these decisions were located.

The emphasis on the taxonomic classification of statutes as the key to choice of law problems was an exercise in mysticism. The means became confused with the ends. Thus, the purposes of classification were often identified with pedantic scholasticism rather than public order priorities. Formalism either deemphasized perspectives or conceded them minimally. Operations were similarly constricted by a formalistic "guessing game" as to how statutes ought to be classified. It is unlikely, therefore, that an undeveloped concept of "operations" balanced by an astigmatic concept of perspectives would lead to a concept of decision sufficiently realistic and responsive to PIL problems.

The scholastic method inaugurated by the statutists falls far short of the comprehensive model of decision to which the policy-oriented approach subscribes. The key concepts—real statutes, personal statutes, and mixed statutes¹²⁹—were a poor substitute for explaining how

129. That methodology was, Nussbaum has commented, "purely conceptualistic (frequently grammatical or etymological). The legal culture was itself critically conditioned by the imprint of scholasticism which had set its imprimatur, *inter alia*, on theology and philosophy." A. NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 11-12 (1943). The main function of this type of legal process was to ensure that each local prescription (or statute) fit into the correct category:

A distinction was drawn between statutes—or rather statutory and customary rules—concerned with persons (*statuta personalia*) and those relating to things (*statuta realia*). Personal statutes governed the legal status of persons

and why competencies were allocated to prescribe and apply policy for transstate transactions and events. They were an astigmatic lens through which to view PIL. Enormous energy was spent determining whether, *a priori*, a statute was real, personal, or mixed, without reference to its goal or purpose.¹³⁰

A number of scattered developments occurred during the period associated with the statutists, but none contributed to a more comprehensive or unifying theoretical framework for PIL. Ideas locating prescriptive outcomes with patterns of primary affiliation led to heightened expectations about the underlying power process. A distinction was drawn between principles of content (*consecutio ad litis decidendum*) and principles of procedure (*consuetudo ad litis ordinationem introducta*), but how this distinction actually worked was severely limited by an inadequate understanding of the decision-making process itself.

The use of reasoning by analogy from certain texts in the *Digest*,¹³¹ rather than from policy (utility) led to the development of the principle *lex loci actus*,¹³² so that after some doctrinal disputation there arose a maxim, *locus regit actum*,¹³³ that aspired to universal

having their domicile or their origin in the country where the statute was in force. Real statutes dealt with all rights to unmovables situate in that country.

Bartolus improved on the theory by setting up a third group of rules—'*statuta mixta*'—later used to denote rules which concern both persons and things.

M. WOLF, *supra* note 2, at 24-25.

130. Cf. M. WOLF, *supra* note 2, at 26 ("nothing was derived from Roman law, yet they pretended that they only developed rules latent in the *Corpus juris*," they were "creating" or prescribing while pretending to be "finding" the law).

131. The *Digest* is "our chief authority for the law of Justinian, but also our chief authority for much of the earlier (Roman) law." W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 39-40 (3d ed. 1966). This work provides a useful background on the development of the *Digest*. See also H. JOLOWICZ & B. NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 490-502 (3d ed. 1972); B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 40-45 (1962).

132. The principle of *lex loci actus* (the law of the place where the act was done) was developed through analogy from two sources: *Dig. Just.* 21.2.6 (if a piece of land has been sold, the question of whether the seller must *cavere pro evictione* should be answered with reference to the customs of the place where the contract was made); and from *Dig. Just.* 50.17.34.

It is questionable whether the general rule that the sale of immovables is to be governed by the *lex loci actus* rather than the *lex situs* can be derived from these passages, but both were regularly quoted by writers to support the proposition throughout the Middle Ages to the eighteenth century. See M. WOLF, *supra* note 2, at 20. The famous property law symbol *lex situs* was formulated about this time as well. *Id.*

133. See M. WOLF, *supra* note 2, at 23. *Locus regit actum* in PIL is the rule that when a legal transaction complies with the formalities required by the law of the country

preeminence. While the justification of the policy implicit in the maxim was located in the custom and authority of the Roman law,¹³⁴

where it is done, it is also valid in the country where it is to be given effect, although by the law of that country other formalities are required. BLACK'S LAW DICTIONARY 1090 (4th ed. 1951).

This question alludes to the allocation of competence to prescribe policy for persons, events, etc. having a multistate character. Bartolus makes an interesting statement that seems quite out of character with the scholastic approach. He talks of confining, prohibitive and burdensome community policy which should not extend beyond the territory of the endorsing community. He does not say why this distinction should be drawn, but the implications lead to interesting speculation about the awareness of the utility of exclusive and inclusive standards in the history of PIL. See BARTOLUS, BARTOLUS ON THE CONFLICT OF LAWS 30-32 (J. Beale trans. 1914 & photo. reprint 1979). Huber also makes this point using the term "prejudice," but it appears there, as in Bartolus' earlier work, to be somewhat ambiguous and its full significance for decision is undeveloped. See U. HUBER, DE CONFLICTU LEGUM (1689).

134. Recorded Roman law provides a meagre catalogue of PIL practice. Notoriously untheoretical as the Roman jurists were, we find no clues in the legal literature about the cross-cultural dimensions of law and legal process from which a viable theory about PIL could have been erected. On two occasions the Institutes of Justinian repeat the following didactic statement attributed to Gaius:

All peoples who are governed by laws and customs use law which is in part particular to themselves, in part common to all men: the law which each people has established for itself is particular to that state and is styled civil law as being peculiarly of that state: but what natural reason has established among all men is observed equally by all nations and is designated *jus gentium* or the law of nations, being that which all nations obey. Hence the Roman people observe partly their own particular law, partly that which is common to all peoples.

J. THOMAS, THE INSTITUTES OF JUSTINIAN, TEXT, TRANSLATION AND COMMENTARY 4 (1975). This comment has a peculiarly contemporary ring to it. The description of the civil law comes very close to a conception of an exclusive community prescription; the ideas of *jus gentium*, common to all mankind, can be seen to have elements of an inclusive perspective about the societal universe. It should be noted that, conceptually, there seems to be no hint of the nature of decision when one is dealing with varieties of exclusive community policy. Nor is there any criterion articulated as to why inclusive standards may be more desirable and may well displace an exclusive and perhaps atavistic relic of civil law. See M. WOLF, *supra* note 2, at 19-20.

Roman lawyers never developed a comprehensive model of authoritative decision. Their framework of decision was essentially that of the formula and the objective was basically that of stability in the establishment and maintenance of minimum order. The formula was the instrument that effectually created the myth or doctrine of law that Roman lawyers were such masters at manipulating. That these doctrines were often supplemented with inclusive standards discovered in the *jus naturale* or *jus gentium*, provides a significant lesson for contemporary PIL. It must be remembered, however, that for the most part, the structure of decision was left as unarticulated as was the policy basis of much of their results.

It would appear that the closest Roman lawyers came to a role that approximates that of a partially disengaged observer was with the lay jurists. But even these actors were close to the power process, although they were "advisors" rather than "practitioners." According to Nicholas, the lay jurist had "characteristics of both the academic and

its true etiology probably lay in the facts of social convenience and utility spawned by ever increasing interactions and interdependencies of peoples, goods and services. But venerable legal doctrines often find manifest justification in past rather than present or future exigencies. *Locus regit actum* appeared to be no exception.

Bartolus made a contribution which was also problematic.¹³⁵ His approach superficially emphasized individual problems and it underscored the need for methodological sophistication in decision but misdirected its focus of inquiry and thus posed the wrong questions. By using the classification of statutes as a starting point, Bartolus formalized a fallacy that permeates PIL doctrine even today. This framework avoids both the social context of law and the claims emerging from society that ought to provide the essential starting point of a comprehensive and realistic theory about PIL.¹³⁶

The Statutists' emphasis on classification of statutes did not extend to the classification of the kinds of decisions that affected either the public or civic order, nor to those specialized to the needs of the transgroup constitutive process. They did not articulate a checklist of the critical intellectual tasks necessary for a more complete theoretical formulation about PIL. Nor did they explicitly postulate goals to guide or inform choice. The fact that they progressed toward "formalizing" the transgroup expectations about the power process, however, is significant.

the practicing lawyer." B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 29 (1962).

We should note that the universalization of Roman legal culture was conditioned more by the quest for global domination and the subjugation of others than by a sensitivity to reciprocal tolerances. See the diffuse, Marxist-oriented study by Kalensky, P. KALENSKY, *supra* note 64, at 46-48, and authorities cited therein. See also M. WOLF, *supra* note 2, at 20. The control factor and its diffusion in the social process are, therefore, critical preconditions for the emergence of structured patterns of reciprocal tolerances. However, it should also be noted that ideas associated with the *jus naturale* and the *jus gentium* were a significant component of the public order domain in Roman law; and here, clearly, the Roman lawyers were adept at preempting the inclusive standard when dealing with the allocation of values implicating groups and subgroups within the Empire, at least until its universalization. See H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 99 (1950).

135. See BARTOLUS, DE SUMMA TRINITATE (J. Beale trans. 1914); Bartolus, *Bartoli A Saxoferrato Commentariae in Codicem*, in F. VON SAVIGNY, PRIVATE INTERNATIONAL LAW AND THE RESTROSPECTIVE OPERATION OF STATUTES app. I (W. Guthrie trans. 2d ed. 1880 & photo. reprint 1972) (1st ed. London 1869).

136. Wolf details Bartolus' framework succinctly: "What groups of relationships fall under a given rule of law? Thus his starting-point was the grouping not of legal relationships between persons, but of the rules of law existing in any given country, such as those contained in the statutes of various Italian city-states." M. WOLF, *supra* note 2, at 24.

Their classificatory system was of value in that operative symbols enabled decisionmakers to stabilize expectations about control and authority across state lines. This feat was rather remarkable because the Statutists were working from a frame of reference that was undeveloped.¹³⁷ In addition, the Statutists had a good sense of the function and use of the authority myth. The doctrines they constructed performed a significant function by serving as an antidote to parochialism in European legal culture. The rules they invented are overly simple, yet they did form the basis of a legal myth justifying the crude ground plan for the allocation of competencies to prescribe and apply law where control is shared by more than one group or state. In sum, the theory of the Statutists exerted significant influence on the developments of theories about PIL for over 500 years. Some of the operative symbols have reinforced the PIL myth system.¹³⁸ The loose roots of control over persons (status, capacity, personality) served the function of localizing problems, and as connecting factors, they played a significant role in the characterization of problems for decision-making. These concepts are still useful today.

B. *Comitas Gentium and Self-Determination: The Dutch School*

1. Background

During the late sixteenth and seventeenth centuries, legal scholars in the Netherlands achieved an historic pinnacle in the development of European legal culture.¹³⁹ Jurists such as Hugo Grotius, Groenewegen

137. According to Nussbaum: "[T]he theory of the statutes persisted on the Continent until the nineteenth century." A. NUSSBAUM, *supra* note 129, at 12. The nomenclature made its appearance in Anglo-American law as well. See *Mathews v. Sniggs*, 75 Okla. 108, 113, 182 P. 703, 708 (1919). As a matter of legal method, it should be noted that the operative symbology performed the function of resolving conflicts of local custom by resort to a functionally inclusive symbol that carried the imprimatur of the Emperor or King. "Consequently, in France, too, there was a law above the local customs which settled the conflicts among the latter." A. NUSSBAUM, *supra* note 129, at 13.

138. See BARTOLUS, DE SUMMA TRINITATE §§ 33, 34, 42 (J. Beale trans. 1914).

139. The Dutch School was greatly influenced by the French. The French statutists have not been dealt with in any depth here. However, reference is made to Charles Dumoulin (1500-1566) and Bernard D'Argentre (1519-1590). Dumoulin seems to have been the first to formulate an adequate notion of party autonomy and refocus the emphasis of PIL on the individual. Ideologically, this is an early move away from what Sir Henry Sumner Maine calls status to contract. H. MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 164-65 (3d ed. New York 1878) (1st ed. London 1861). See also P. KALENSKY, *supra* note 65, at 67. The Marxist view of Dumoulin sees him as the originator of party autonomy and, effectually, as a mouthpiece of the merchant class. *Id.* D'Argentre led the reaction to this ascription of power to private parties proffered by Dumoulin. His response was highly conditioned

van der Made, Paul and Johannes Voet, Ulrik Huber, and others produced formidable works that rank with the greatest and most durable contributions to world legal science.¹⁴⁰ The writings of these jurists were as significant in international areas as they were in areas of less inclusive concern.

The most well known jurist of this period for PIL was the Frisian judge and scholar, Ulrik Huber. His thesis was superficially simple and was set in three maxims which are summarized as follows: First, the laws that bind each state have force within the limits of that government and bind all subject to it, but not beyond those limits. Second, all persons within the geographical limits of a government are deemed to be subjects thereof, regardless of whether they reside there permanently or temporarily. Third, a sovereign will act under principles of comity to honor rights acquired within the territory of another sovereign so that such rights retain their force everywhere, unless honoring them would prejudice the power or rights of such a government, or its citizens.¹⁴¹

Huber's work represents one of the earliest positivistic formulations about law. In seeking to describe the "law as it is," he fused the role of scholar with that of decisionmaker. Huber was, of course, a judge with considerable intellectual accomplishment and his primary identifications were more intensively displaced upon his Frisian na-

by Bodin's notions of feudalism, territorialism and sovereignty, and he applied these perspectives to PIL. The orthodox Marxian interpretation locates D'Argentre as the mouthpiece and apologist of the feudal barons against the power alignments of the King and the Paris bourgeoisie. D'Argentre was himself an aristocrat and an avowed opponent of such subversive ideas as were contained in party autonomy. The Dutch School preempted D'Argentre's territorial feudalistic notions to ideologically reinforce states' rights in the Netherlands. See *id.* at 64-72. See also M. WOLF, *supra* note 2, at 26-30. The most glaring flaw in D'Argentre's formulation was his inability to explain why, given the territorial omnipotence of territorial statutes, courts would apply foreign prescription because of expediency or a sense of justice, i.e., why a court would apply and prescribe an inclusive standard in the allocation of indulgences or deprivations. See J. SZASZY, *CONFLICT OF LAWS IN THE WESTERN, SOCIALIST AND DEVELOPING COUNTRIES* 48 (1974). On territorial sovereignty and the Dutch School, see P. KALENSKY, *supra* note 64, at 70-74. The Dutch solution to the logical puzzle posed by the French was the ridiculously simple *comitas gentium* concept. See J. SZASZY, *supra*, at 49.

140. See R. LEE, *AN INTRODUCTION TO ROMAN-DUTCH LAW* 2-23 (5th ed. 1953). Works by these scholars include S. GROENEWEGEN *VAN DER MADE, TRACTATUS DE LEGIBUS ABROGATIS ET INUSITATIS IN HOLLANDIA VICINISQUE REGIONIBUS* (1649); H. GROTIUS, *INLEIDINGE TOT DE HOLLANDSCHE RECHTSGELEERDHEID* (1631); U. HUBER, *supra* note 133; J. VOET, *COMMENTARIUS AD PANDECTAS* (Hagae-Comitum 1726). Grotius is generally called the father of modern international law. See C. RHYNE, *supra* note 23, at 16.

141. See, e.g., Lorenzen, *Huber's De Conflictu Legum*, 13 NW. U.L. REV. 375, 403 (1918); J. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* 29 (8th ed. 1883 & photo. reprint 1972) (1st ed. Boston 1834).

tionalism, albeit a comity qualified variety. It may be said, therefore, that Huber never really established a clear observational standpoint, one which would have enabled him to articulate a theory *about* PIL rather than his modest alignment of maxims *of* PIL. His fundamental identifications reflected great deference to less inclusive patterns of control and authority.

Huber's exclusivistic emphasis upon the primacy of the Frisian state was a reaction to a heritage of Spanish imperialism and, perhaps, the excesses of the Inquisition. In Huber's estimation, the inclusive and more comprehensive perspective was associated with natural law. Because of this association with natural law, the Holy Roman Empire, and perhaps the Spanish conquest, it was rejected. Correlatively, the right to self-determination of the seventeen states of the Netherlands was given a primary ideological focus in his PIL formulations. A comprehensive conception of community was, therefore, sacrificed to the demands for group autonomy contained in the creation and legitimation of the symbols of national sovereignty. These symbol-events were reflected in Huber's jurisprudence, and more especially, in his approach to PIL. To the extent that the concept of sovereignty, as Huber understood it, became somewhat reified, the relevance of a conception of community in a larger sense became more difficult to articulate and define by the Dutch school. It may be said that Huber's work contains the seeds of formalistic positivism based on the concept of national sovereignty.

Huber's maxims focus on the state as the source of law. This focus bears a striking resemblance to Bartolus' position.¹⁴² Structurally, there is little difference between these theorists with regard to their conception of an adequate focus of inquiry and similarly, their starting point appears not to be rooted in the subjectivities of the component actors. Indeed, it may be urged that Huber's framework focuses more on the *conceptual* than the *empirical* as the starting point of inquiry. Huber's work is far too brief and cryptic, however, to allow a more thorough analysis of his positivism as applied to PIL.

The emphasis on a balanced view of perspectives and operations suffered from an equally limited framework. Huber's formalism gave great deference to a limited rule-structure that reflected transgroup perspectives in a very sparse manner. This appears to be supported by the second of Huber's maxims, which seems to justify the near exclusive importance of the *lex fori* over transstate claims. The maxim stresses the idea that all persons within the spatial reach of territorial

142. Bartolus directed his attention to state statutes as the key to PIL problems. See *supra* text accompanying notes 134-35.

elites are presumptively treated as being primarily affiliated with the territorial unit in which they are found at the "instant" a claim involving the person is made. This obscures the necessity of developing *transstate* perspectives and operations that are needed in this context.

Huber's understanding of the ideas of control and authority appear to be derived from his conception of sovereignty—the first of his principles about the nature of PIL. The meaning of sovereignty for Huber derived from the statist paradigm of seventeenth century Europe, a paradigm of the state system that was formalized by the Peace of Westphalia (1648).¹⁴³ The state-sovereignty idea received accentuated affirmation in the Netherlands mainly through the efforts of the great Dutch jurist, Johannes Voet.¹⁴⁴ The myth of territorial sovereignty here envisioned resembles a kind of reified garrison theory of the transnational power process. The formalization of the statist paradigm and the symbology of sovereignty that sought to sustain it represented both an advance and a retreat in the development of PIL theory. The strength of the principle was that it indirectly acknowledged that one cannot state a PIL theory without some concern for the transgroup dynamics of the power process. Its chief weakness was the use of the term sovereignty itself. "Sovereignty" is capable of radically different meanings and is an extremely ambiguous abstraction from reality;¹⁴⁵ the concept does not allow an observer or decisionmaker to draw a clear distinction between the conceptions of *control* and *authority*.¹⁴⁶

To the extent that Huber's framework was concerned with indices of *authority* in a multi-state context, reference to the comity principle, the third of Huber's standards in PIL, is appropriate. By invoking the comity principle, Huber introduced a caveat to the extended allocation of power by state elites to themselves. This qualification was, of course, conditioned by the facts of the transgroup power process which engendered the potential for retaliation. Added to this qualification was the barest vestige of a minimum order concept, implied in the expectations, that the notion of "prejudice" carried over to affected elites or individuals.

Huber made no clear-cut distinctions among the kinds of operations that deal with public order or the civic order, or even with the transgroup constitutive process. Little deference was given to the recommended intellectual tasks. Huber did not explicitly postulate any

143. Peace of Westphalia, 1648, 1 Parry's T.S. 1.

144. J. VOET, COMMENTARIUS AD PANDECTAS (Hagae-Comitum 1726).

145. On the multiplicity of meaning of this concept, see W. NAGAN, THE CONTEXT OF SOVEREIGNTY (unpublished manuscript available in the Offices of the New York Law School Journal of International and Comparative Law).

146. See W. Cook, *supra* note 81, at 48-70.

public order goals of a preferred character other than those reflected in his maxims.

Huber's contribution may be summarized in these terms: (1) The context of power and territoriality as a power base is emphasized; (2) transgroup power configurations on the theory of comity and the tacit consent fiction that justifies it are accounted for; (3) reference is obliquely made to some sort of policy differentiation regarding basic community policy in the guise of the "prejudice" caveat; and (4) a distinction between prejudice toward state elites and prejudice toward individuals is ambiguously acknowledged.

For all their brevity, Huber's principles were extremely influential in the development of more modernist theories about PIL. The territorialism that sustained his doctrine of sovereignty retained a sufficiently feudal tone which made it appealing to the legal fraternity of that time. In some ways it also anticipated a more parochial focus on PIL, moving perilously close to a PIL non-law framework.¹⁴⁷ On the other hand, the comity fiction was seized upon by Justice Joseph Story and provided the seeds for a vigorous and influential international perspective.¹⁴⁸ Huber's contributions may be seen to be problematic in other respects as well. The demolition of canonical universalism occasioned only a pseudo-realism which was out of phase with facts of transgroup behavior. Indeed, it is not unfair to add that this kind of realism has often been a euphemism for parochialism.

In summary, it may be said that Huber's work represents one of the earlier positivistic formulations about law and legal process. The formulation is essentially a theory *of* rather than *about* PIL. The perspective seems to be that of the active decisionmaker and appears to be significantly influenced by a comity-qualified Frisian nationalism. Law was seen as emanating from the Frisian "state," not from some transempirical source, yet Huber's standpoint was not one that could be entirely freed from the metaphysical natural law that he despised.¹⁴⁹

2. Comity as a Brooding Omnipresence: Story's Naturalism

Story, in his *Commentaries*,¹⁵⁰ preempted Huber's framework for

147. See McDougal, Lasswell & Reisman, *supra* note 44, at 209 nn. 28-29 and accompanying text.

148. See J. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* (8th ed. 1883 & photo. reprint 1972) (1st ed. Boston 1834).

149. Indeed, Huber, himself, embraced a number of metaphysical ideas. His idea of the state was mainly transempirical. The "bindingness" of rules of positive law are a distinct residue of his own unacknowledged transempirical assumptions about law and legal process. See Lorenzen, *supra* note 141, at 376-77, 398-99.

150. J. STORY, *supra* note 148.

the Anglo-American posterity, but what *De Conflictu Legum*¹⁵¹ lacked in bulk, Story supplied in substantial amplitude. The publication of Story's *Commentaries* was a major legal event and the book was lavishly praised and extensively relied upon in practical decisional arenas.¹⁵²

The scheme of Story's book was dominated by two complementary principles which he had culled from the Dutch school. The first principle was the idea of territorial sovereignty as refined by Voet¹⁵³ and integrated more fully into the PIL framework by Huber.¹⁵⁴ The second principle was the comity notion that Huber had added in order to qualify the overextended conception of sovereignty implied in the sovereignty doctrine.¹⁵⁵ Story emphasized, however, the concept of comity, which effectually formed the basis of his system.¹⁵⁶

Story's main thesis may be set out as follows: First, each nation or state is presumed to have exclusive sovereignty and jurisdiction within a territorial framework.¹⁵⁷ Second, each state is legally omnipotent within its territorial domain; it may bind directly all forms of property and all persons within that territorial domain and may exercise this territorial framework.¹⁵⁸ Third, the reach of a state's legal power is circumscribed by its territorial base.¹⁵⁹ The fourth postulate is best stated in Story's own words: "[W]hatever force and obligation the laws of one country have in another, depends solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and policy, and its own express or tacit consent."¹⁶⁰ Story supported the *comitas gentium* notion as the basis of PIL in the following terms:

The true foundation, on which the administration of international law must rest, is that the rules, which are to govern, are those which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice,

151. U. HUBER, *supra* note 133.

152. *In re Barrie's Estate*, 240 Iowa 431, 35 N.W.2d 658 (1949); *Ogden v. Ogden*, 40 Misc. 473, 82 N.Y.S. 710 (N.Y. Sup. Ct. 2d Dist. 1903); *In re Bozzelli's Settlement*, [1902] 1 Ch. 751, 757-76.

153. J. VOET, *supra* note 144.

154. Lorenzen, *supra* note 141, at 401-18.

155. *Id.* at 403.

156. J. STORY, *supra* note 148, at 32-39.

157. *Id.* at 21.

158. *Id.* at 25.

159. *Id.* at 22.

160. *Id.* at 25.

in order that justice may be done to us in return.¹⁶¹

Story retained a consistent standpoint which seemed to reflect a highly inclusive sense of the self. On this point he seems to have been somewhat precocious. Yet it is this perspective that served to make his book an international success. He provided a sense of universal outlook by suggesting that reference should be made to common interests for the solution of choice of law problems.¹⁶²

Story's focus of inquiry aspired to a form of universalism, of a Eurocentric variety,¹⁶³ rooted in the natural law perspective. But the inclusive perspective was not sufficiently tempered by a realistic concept of a community in global terms. While the work does represent an initial effort at adumbrating a cross-cultural, transnational focus, the concept of community process was lost in the reifications of territorial sovereignty. The reality of decision within the community power process never emerged clearly. Story did develop a comprehensive focus of the concept of community in global terms, but the operational indices he used to sustain this focus were undeveloped.

Story's common law instincts and his flair for practicality and convenience made his work persuasive and distinct from the more pedantic character of the continental scholarly tradition. Story did try to relate the particulars of litigation realities to a broader conceptual map. Indeed, Story can, in part, be read as one who had at least a vague and unarticulated sense of relevance of context. For this reason, many lawyers found his talent of relating particular cases to the broader values, to be a significant part of his contribution to PIL. Story may be seen, however, as overemphasizing perspectives at the expense of operations.

Story's conception of control and authority was also inadequate when judged in contemporary terms. For example, the many different meanings attached to the idea of sovereignty and the appreciation of the dynamics of control and authority in PIL are poorly developed. This is the weakest part of Story's theory, although in his analysis of practical instances, he often appeared to be more sensitive than his peers to the content of transstate community expectations. Although Story's work contains many *de facto* classifications of decision, there is no real attempt to be systematic, and the policies at stake, even when he seemed conscious of them, were never very clearly focused. A further important weakness in Story's theory is the somewhat uncritical acceptance of continental classifications and the almost anecdotal character of some of the exposition. Even where there was an appreciation

161. *Id.* at 34.

162. *Id.* at 5.

163. *See supra* note 122.

of at least some of the recommended intellectual tasks, it almost always emerges amid a maze of superfluous or tendentious words. It should be noted, however, for its time, this represented a most systematic exposition of a difficult subject, and Story's shortcomings on this score ought not overshadow his many great insights about PIL.

Story's natural law inclination gave him the ability to sense the utility of postulation of goals of public order as distinct from actual behavior patterns. His preferences though, were diffuse and not clearly connected with the facts of social process. However, he sensed the need for resolving practical problems by use of the common interest idea.¹⁶⁴

The comity doctrine developed by Story was severely criticized by major legal theorists associated with the vested rights theory.¹⁶⁵ Dicey's critique is perhaps the most representative.¹⁶⁶ Comity has been generally criticized as being vague and discretionary.¹⁶⁷ Its exponents never clearly focused on when and why reciprocities should or should not be mandated. While this point may be sustained in the context of particular cases, Story's theory provides a strong justification for the notion of reciprocal tolerances in PIL. Despite the fictional quality of the idea of forum consent implicit in the comity idea, the fact of global interdependency in the multi-state process made the idea an important one.

Story articulated a near universalistic perspective about PIL and in the manipulation of the comity symbol, provided a significant antidote to the strongly nationalistic trends of the nineteenth century.¹⁶⁸ The global perspective, however, was achieved at the expense of the notion of actual transnational operations. Story's theory in some measure overemphasized perspectives at the expense of operations, a point devastatingly exploited in attacks on Story's ideas of sovereignty and territorialism made by Cook.¹⁶⁹ In fairness to Story, it should be em-

164. See *supra* text accompanying note 121.

165. J. BEALE, *supra* note 1, § 5.4; A. EHRENZWEIG, *supra* note 39, at 53-54 (Story's assumption of a binding *jus gentium* retarded the development of American conflicts doctrine for almost a century). See Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HAR. L. REV. 361 (1945) (outlines and appraises the American theories and comity and vested rights).

166. DICEY AND MORRIS ON THE CONFLICT OF LAWS 5-6 (J. Morris 10th ed. 1980).

167. H. GOODRICH, *HANDBOOK OF THE CONFLICT OF LAWS* 11-12 (3d ed. 1949); F. WHARTON, *CONFLICT OF LAWS* 6 (2d ed. 1881); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924).

168. See J. MORRIS, *THE CONFLICT OF LAWS* 501 (2d ed. 1980). "[T]he theory has performed a useful function in freeing our subject from parochialism . . ." *Id.*

169. See W. COOK, *supra* note 81, at 48-70. In this chapter, Cook analyzes the logical bases of postulates Story discussed in his *Commentaries*. Cook finds these postulates internally inconsistent and concludes that they all should be discarded with the exception of the general notion that every nation possesses an exclusive sovereignty and jurisdiction within its own territory. *Id.* at 67.

phasized that the teleological character of Story's book was distinguished by a genuine and, for its time, quite successful attempt to emphasize practical values. It should also be noted that his more formalized expressions (postulates, as Cook calls them) reflect a greater, though unclear, deference to minimum order conceptions, while paradoxically, his practical illustrations and his case analyses evidence something more in the structure of human interactions. Story's legacy was one of those that prompted the realization that PIL was needed for structuring global society in preferred ways; this was no minor achievement. Story, like other naturalists of his genre, held an integrated view of man and community. This enabled him to translate this vision into a larger, more comprehensive PIL framework. He contributed to the evolution of institutional symbols and operational techniques. These were geared to a more inclusive construct of both the indivisibility of man and the potentials latent in PIL for achieving the realization of the common interest.

C. *Vested Rights: A Dog Will Fight for his Bone*

The theory of vested rights has often been described as an exercise in legal fundamentalism.¹⁷⁰ The fundamentals of the theory work, in part, on the assumption of a Hobbesian universe, and reflect the basic function of law as the control and regulation of aggression. The idea of a legal right, the fundamental corollary of the legal obligation, for example, reflects the "obvious" assumption, that without the notion of "right," a "dog will fight for his bone."¹⁷¹ This approach is critical of the natural law implications of Justice Story's comity influenced perspective. Theorists working in this perspective focused on the assumptions of Huber's second principle—the doctrine of territorial sovereignty.¹⁷²

The symbology of territorial sovereignty tied in neatly with the development of legal positivism as advanced by Austin in his series of lectures published under the title *The Province of Jurisprudence Determined*.¹⁷³ But the perspective developed was not that of empirical science in the positivist tradition of behavioral social science; rather it was that of logical science in a more formalistic sense. Hence, Holland could justly define jurisprudence as the formal science of positive

170. A. EHRENZWEIG, *A TREATISE ON THE CONFLICT OF LAWS* 14 (1962).

171. O. HOLMES, *COLLECTED LEGAL PAPERS* 314 (1920).

172. See *supra* text accompanying notes 139-41.

173. 1 J. AUSTIN, *LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW* 79-341 (R. Campbell 5th ed. 1911) (1st ed. 1885) (six lectures originally delivered at the University of London in 1828, parts of which were limitedly published in 1823).

law.¹⁷⁴ Dicey in England and Beale in the United States were among the foremost exponents of a formalistic variety of positivism in PIL.

1. Background to the Vested Rights Theory

The vested rights, or *obligatio* theory was an early major positivistic theory of PIL with essentially Anglo-Saxon roots.¹⁷⁵ The theory built upon the territorial sovereignty of foundations of the Dutch School but rejected its comity aspect as set out by Story. Professor Beale described it as follows: "Instead of the Dutch theory of comity, the common law has worked out indigenously a theory of vested rights, which serves the same purpose, that is, the desire to reach the just result, and is not subject to the objections which can be urged against the doctrine of comity."¹⁷⁶ This theory was favored by some of the

174. T. HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* 13 (13th ed. 1924). Holland states:

Jurisprudence is not a science of legal relations *a priori*, as they might have been, or should have been, but is abstracted *a posteriori* from such relations as have been clothed with a legal character in actual systems, that is to say from law which has actually been imposed, or positive law.

Id. at 9. This approach is now called the "analytical school" and is described by Lasswell and McDougal as the jurisprudence which "dominates thinking in much of the world today." Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 367 (1971). Its emphasis is on "systems of rules emanating from established officials. . . . [L]aw is defined as the rules prescribed and applied by distinctive institutions of authority—sovereigns, courts, and legislatures" *Id.*

The name "analytical school" is misleading because the formalistic positivists do not, of course, have a monopoly on analytical techniques about the legal process, any more than any other acknowledged jurisprudential perspective. See generally E. PATTERSON, *JURISPRUDENCE, MEN AND IDEAS OF THE LAW* (1953).

175. See Cowan, *Marks of Primitivity in the Conflict of Laws: A Jurisprudential Analysis*, 26 RUTGERS L. REV. 191, 198-99 (1973). Professor Cowan believes that the ideological bases for the vested rights doctrine used by Americans are to be found in the ancient struggle of the "English landed aristocracy" and the emerging "bourgeois" over the alienability of real property. *Id.* at 198. To keep real property out of the market, interests with regard to it were symbolized by the concept of vesting—vested rights. Such rights were seen as "sacrosanct." *Id.* at 199. A similar development is to be found in nineteenth century United States constitutional law theory which protected property and contract rights by calling them vested rights. *Id.*

176. 3 J. BEALE, *THE CONFLICT OF LAWS* 1967 (1935). Beale summarized this territorial theory in J. BEALE, *SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS* (1935). He states:

§1. The topic called "Conflict of Laws" deals with the recognition and enforcement of foreign created rights.

§2. In the legal sense, all rights must be created by some law. A right is artificial, not a mere natural fact; no legal right exists by nature. A right is a political, not a social thing; no legal right can be created by the mere will of parties.

Law being a general rule to govern future transactions, its method of creat-

most revered judges in American Law.¹⁷⁷ Justice Holmes was the leading exponent of the *obligatio* theory.¹⁷⁸ The theory is regarded as fundamentalist because its theoretical underpinnings are rooted in Holmes' idea of the nature of a legal right.¹⁷⁹ Indeed, the *obligatio* the-

ing rights is to provide that upon the happening of a certain event a right shall accrue. The law annexes to the event a certain consequence, namely the creation of a legal right. The creation of a right is therefore conditioned upon the happening of an event.

§3. Events which the law acts upon may be of two sorts; acts of human beings, and so-called "acts of God," that is, events in which no human being has a share. Rights generally follow acts of men; though sometimes a right is created as a result solely of an act of God (as lapse of time: accretion).

§4. When a right has been created by law, this right itself becomes a fact; and its existence may be a factor in an event which the same or some other law makes the condition of a new right. In other words, a right may be changed by the law that created it, or by any other law having power over it.

§5. If no law having power to do so has changed a right, the existing right should everywhere be recognized; since to do so is merely to recognize the existence of a fact.

Id. at 1. "§47. A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere." *Id.* at 18. The American Law Institute's First Restatement of Conflict of Laws adopted Beale's perspective on the vested rights theory. J. MORRIS, *supra* note 168, at 503.

177. See J. MORRIS, *supra* note 168, at 502. Morris noted that both Oliver Wendell Holmes and Benjamin N. Cardozo were among those judges advocating this theory. See *Slater v. Mexican Nat'l R.R. Co.*, 194 U.S. 120 (1902) (Holmes, J.); *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 120 N.E. 198 (1918) (Cardozo, J.).

178. Holmes discussed the "obligatio" theory in *Slater v. Mexican Nat'l R.R. Co.*:

The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found . . . But as the only source of this obligation is the law of the place of the act, it follows that law determines not merely the existence of the obligation . . . but equally determines its extent.

194 U.S. 120, 126 (1904) (citations omitted).

179. See O. HOLMES, *COLLECTED LEGAL PAPERS* 310, 313-14 (1920); Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918). Holmes discussed the idea of a legal right as follows:

I see no *a priori* duty to live with others and in that way, but simply a statement of what I must do if I wish to remain alive. If I do live with others they tell me that I must do and abstain from doing various things or they will put the screws on to me. I believe that they will, and being of the same mind as to their conduct I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights. But for legal purposes a right is only the hypothesis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space. One phrase adds no more

ory served as the doctrinal underpinning of the *Restatement of the Conflict of Laws*.¹⁸⁰ Under this theory, legislative jurisdiction was deemed paramount.¹⁸¹ That is, where a state had exercised its legisla-

than the other to what we know without it. No doubt behind these legal rights is the fighting will of the subject to maintain them, and the spread of the emotions to the general rules by which they are maintained; but that does not seem to me the same thing as the supposed *a priori* discernment of a duty or the assertion of a preexisting right. A dog will fight for his bone.

O. HOLMES, *supra*, at 313-14.

180. RESTATEMENT OF CONFLICT OF LAWS § 5 comment d, § 8 comment j (1934).

181. It is commonly assumed that the *obligatio* or vested rights approach to the choice of law process has the virtue of simplicity, predictability and certainty. The latter value is particularly esteemed by lawyers working from the perspective of analytical positivism. In fact, the system in practice was anything but simple, predictable or certain—in all but the most simple cases. For example, the rule *lex loci contractus* referred—often simultaneously—to the law of the place of performance as well as the law of the place of execution. See *Pritchard v. Norton*, 106 U.S. 124 (1882); *Marie v. Garrison*, 13 Abb. N. Cas. 210 (N.Y. Super. Ct. 1883). Traditional practice also recognized a principle presuming validity, and a strong presumption honoring choice of law clauses in validating contracts. *Id.* at 300. The problems occasioned by these complementaries in the contracts aspect of choice of law have made the field anything but predictable, simple, certain, or permitting ease of application.

The rules relating to torts are not much better, because the rule *lex loci delictus*, taken literally could mean, *inter alia*, the place where the wrong was initiated or the place of the "last event," the sub-principle preferred by Professor Beale. Even the "last event rule" was qualified by exceptions. For example, the Restatement of Conflict of Laws, dealing with the consumer of poisoned candy tells us that the place where the poison candy takes effect is the *lex loci delictus*. RESTATEMENT OF CONFLICT OF LAWS § 377 note, rule 2 (1934). The defamation-broadcast cases add a special note of uncertainty to the perspective. See *id.* rule 5; *Dale Systems, Inc. v. Time, Inc.*, 116 F. Supp. 527 (D. Conn. 1953). As a critic of the Restatement has trenchantly suggested, the idea of a single, simple rule for all the complex torts problems with the added difficulty of the multistate dimension is questionable. Professor Morris asks whether it is inherently probable that courts will achieve socially desirable results if they apply the same conflict rule to liability for automobile negligence, radio defamation, escaping animals, the seduction of women, economic conspiracies, and wrongful conversion. Morris, *The Proper Law of Tort*, 64 HARV. L. REV. 881, 884 (1951).

The third significant rule from the traditional perspective is the *lex situs* rule: the law of the situs of the property supplies the rule of decision. The rule has covered problems dealing with real property (immoveable), personal property (moveable), and incorporeal property (moveable-intangible). The rule has been criticized as highly simplistic and in practice has led to unsatisfactory results. See *In re Barrie's Estate*, 240 Iowa 431, 35 N.W.2d 658 (1949) (revocation of Illinois will, not honored by law of *lex situs* because real estate in Iowa); *Morson v. Second Nat'l Bank of Boston*, 306 Mass. 588, 29 N.E.2d 19 (1940) (situs of gift stock certificate); *Cammell v. Sewell*, 5 Hurl. R.N. 728, 157 Eng. Rep. 1371 (1860) (*lex situs* applied to protect third party purchaser of cargo of wrecked ship).

The fourth major rule when viewed historically is to some degree in derogation of the territorialist principles of contracts, torts, and property. This rule is the rule that the *lex domicilii* is to supply the rule of decision in choice of law cases. The concept of

tive power in regard to persons or property subject to its jurisdiction,

domicile perhaps more so than other traditional choice of law rules, has defied efforts to accord it a unitary, single meaning for all purposes. Indeed, Walter Wheeler Cook demonstrated that as used the concept's meaning changed with the context. Fundamentally the concept of domicile, sometimes used as a synonym for residence or habitual residence, citizenship, or nationality, deals with the nexus a person or entity has with a body politic, however inconclusively this latter notion is defined. That nexus or connecting link is thought to entitle the body politic to control and regulate the legal incidents affecting that person or entity. Taken literally, such an assertion of control would extend to wherever the spatial location of the individual might be, hence territorial considerations as a function of power may be less than compelling. In practice, the tension between territorial and personal prescription has been particularly problematic in the context of decedents' estates, *lex domicilii* versus *lex situs*, and in the area of family law, *lex loci celebrationis* versus *lex domicilii*. Regarding estates, see *In re Jones' Estate*, 192 Iowa 78, 182 N.W. 227 (1921); *White v. Tennant*, 31 W. Va. 790, 85 S.E. 596 (1888). See also R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS, CASES—COMMENTS—QUESTIONS* (3d ed. 1981); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* (2d ed. 1980). In the family law area, see *In re Dalip Singh Bir's Estate*, 83 Cal. App. 2d 256, 188 P.2d 499 (1948); *In re Mays Estate*, 305 N.Y. 486, 114 N.E.2d 4 (1953); *Lanham v. Lanham*, 136 Wis. 360, 117 N.W. 787 (1908). See also Nagan, *Conflict of Laws and Proximate Relations: A Policy-Science Perspective*, 8 RUT.-CAM. L.J. 416, 443-79 (1977).

The traditional rule structure is completed by reference to the pleading and proof of foreign law, and the complicating notion that foreign law is a fact to be determined in a common law court by a panel of jurors. See *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956).

This structure naturally generated its share of legal complementarity, described in current literature by the inelegant phrase "escape devices." See R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS, CASES—COMMENTS—QUESTIONS* 61-143 (2d ed. 1975); R. WEINTRAUB, *supra*, at 48-89. Among the most significant of these complementary concepts are *renvoi*, *dépeçage*, characterization, the "incidental question," and public policy. Illustrations of characterization under the traditional approach are reflected in *Alabama Great S.R.R. Co. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892) (plaintiff lost the argument that the problem sounds in contract rather than tort and is to be governed by the place of making of the contract). Compare *Venuto v. Robinson*, 118 F.2d 679 (3d Cir. 1941) with *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 A. 163 (1928). These cases deal with vicarious liability. *Venuto* characterizes the problem as tort; *Levy* characterizes the problem as contract. See also *Kline v. Wheels by Kinney, Inc.*, 464 F.2d 184 (4th Cir. 1972). In the area of intra-family torts, see *Haumschild v. Continental Casualty Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959) (automobile accident involving husband and wife recharacterized as a problem dealing with family relationship to be governed by law of family domicile). For examples dealing with contract-conveyance classifications, see *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12 (1897) (promissory note and mortgage on separate property in Florida deemed invalid at place of contract were held valid as conveyances under the *lex situs* rule). The contract characterization was used in *Atwood v. Walker*, 79 Mass. 514, 61 N.E. 58 (1901), and the property characterization was used in *Wilson v. Kryger*, 29 N.D. 28, 149 N.W. 721 (1914), *aff'd* 242 U.S. 171 (1916). Savings bank trust accounts have posed problems of special difficulty for characterization. Are they to be regarded as gifts *causa mortis*, inter-vivos gifts, inter-vivos trusts, testamentary trusts, wills, assignments of contractual rights, or third party beneficiary contracts? Compare *Succession of Shadrick*, 129 So. 2d 606 (La. App. 1961) with *Boyle v. Kempkin*,

any rights created by virtue of power predicated upon such legislative jurisdiction was entitled (subject to certain caveats) to legal recognition everywhere. It should be remembered that a jurisdiction honoring an *obligatio* that had been created in another state was not honoring it in terms of the law of that state, rather it was honoring a *right* vested in that state, i.e., an *obligatio*. The best statement of the vested rights-legislative jurisdiction formula came from Holmes in the case of *Cuba Railroad v. Crosby*:¹⁸²

When an action is brought upon a cause arising outside of the jurisdiction . . . the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With rare exceptions the liabilities of parties to each other are fixed by the law of the territorial

243 Wis. 86, 9 N.W.2d 589 (1943).

Another dimension of characterization involves the perennially difficult problems of substance and procedure. See *Kilberg v. Northeast Airlines Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (Massachusetts' statute of limitation for wrongful death recovery deemed procedural). For special problems of statutes of limitations in this context, see *Gillies v. Aeronaves de Mexico, Sav. Ass'n.*, 468 F.2d 281 (5th Cir. 1972).

Dépeçage has been the device whereby different rules of different jurisdictions are used to determine different issues in the same case. In terms of result, the use of dépeçage may sometimes lead to the formulation of a new multistate rule quite different from the law of either connected state. For example, in *Marie v. Garrison*, a contract void in one state and not enforceable in another state was held to be valid and not enforceable in the latter state but nevertheless enforceable in the former state, which state makes such a contract void but does not prohibit the enforcement of a contract valid in another state, 13 Abb. N. Cas. 210 (N.Y. Super. Ct. 1883).

Major exceptions to the obligation to honor a foreign cause of action are that a forum need not enforce laws dissimilar to its own, nor enforce the penal or revenue laws of another jurisdiction. In addition, a foreign created obligation will not be enforced if it is incompatible with the catch-all category of public policy of the forum. Of these categories the public policy exception has been the most difficult to delimit. Compare *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 120 N.E. 198 (1918) with *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936). See also Paulsen & Sovern, "Public Policy" in the *Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

If the traditional perspective were meant to epitomize simplicity, uniformity, predictability, and certainty in the protection of basic expectations, it would have to be admitted that these goals were only honored in a narrow spectrum of simple cases. The system was complex, devoid of any real unity or predictability, and, in fact, the normative structure of the system supported not stability of expectation, but expectations of change. Indeed, a major expectation of the traditional system must have been its unpredictability and the recognition of large vistas of discretion in the control and regulation of choice of law.

182. 222 U.S. 473 (1912).

jurisdiction within which the wrong is done and the parties are at the time of doing it That and that alone is the foundation of their rights.¹⁸³

In *Loucks v. Standard Oil Co. of New York*,¹⁸⁴ Cardozo repeated the essence of the Holmesian view as follows:

A foreign statute is not law in this state, but gives rise to an obligation which, if transitory, "follows the person and may be enforced wherever the person may be found. . . ." The plaintiff owns something and we will help him get it. We do this unless some sound reason of public policy makes it unwise for us to lend our aid.¹⁸⁵

The vested rights—territorial sovereignty *vinculum* had all the classic characteristics of the analytical framework.¹⁸⁶

2. Observational Standpoint

The standpoint of the vested rights theorists is peculiar and highly paradoxical. Their normal dualistic focus tended to provide them with a quite exclusive standpoint which "logically" should have compelled a non-law perspective about international "law." The isolation of transnational vested rights independent of the transnational community process—a distinctly metaphysical enterprise—compelled a broader

183. *Id.* at 478. Holmes added:

[T]he only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it.

Id. at 479.

184. 244 N.Y. 99, 120 N.E. 198 (1918).

185. *Id.* at 110, 120 N.E. at 201.

186. McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968).

Although the analyticalist does not examine the relation of social process and authoritative decision in his juridical work, this exclusion is a conscious choice rather than an omission from inadvertance. It is expressive of an extraordinary degree of concern with social and legal stability: fixed rules, applied in a fixed manner, are believed to provide a frame of stable decision hence stable expectation for all those to whom they are directed. The built-in assumptions are that verbal rules, as well as other communications, are capable of an independent non-contextual import; that there is a necessary convergence in fact of formalized authority and effective control; that social process is or can be made as stable as legal *nomostatics*; and that the relation between authoritative decision and social process is that the latter is subservient to the former.

Id. at 244-45.

identification by default. But this was an identification with an "idea" or abstracted concept (the detached vested right). On the other hand, the attempt to describe the "rules" of PIL *as they are*, meant that the capacity to articulate a theory *about*, rather than *of*, PIL was undermined at the very outset of scholarly inquiry. These difficulties stimulated other complexities about the nature, origin and structural locus of PIL "rules" associated with dualism. The implications of dualism meant that the theorist would initially lack an inclusive identification with the key participants in the process of law-making and law-applying. Second, this narrow identification would inhibit the capacity to articulate interests of broader, inclusive significance. Third, a scientific perspective rooted in the behavior of participants is undermined. The characteristic standpoint of the vested rights theorist was his mercurially shifting pattern of identifications and a misperception of role-function.

3. Focus of Inquiry: Comprehensiveness in Conception of Relevant Community

The theoretical rigidity of the vested rights-territorial sovereignty formulation provided little latitude for developing a comprehensive concept of social process for the global community. Law is effectually the sovereign's command. It follows that the relationship of law to social process, however broadly one defines it, is deemed irrelevant to the formalist. Rights duly created have an autonomous existence and a "correct" solution to a claim predicated upon a vested right can always be found. The vested rights approach made it difficult to articulate international perspectives in realistic terms and served, in the long run, to inhibit the development of a more satisfying theory about PIL.

4. Comprehensiveness in Conception of Decision

The arid conceptualism of this school severely limited the development of a comprehensive theory about law or an adequate account of the taxonomy of decision. The methodology of the vested rights school generated a perspective about decision that was incomplete. Essentially, the methodology associated with the marriage of legislative jurisdiction, sovereignty, and vested rights was described as that of "selecting jurisdictions"; all key PIL symbols, given any degree of operational effect, were seen to "select" the appropriate system of law; that *system* would then supply the rule of decision in the particular case. Thus the symbol *lex loci contractus* would function in such a manner as to spatially locate the correct territorial sovereign whose law was to govern a legal relationship in space and time. Applied to specific problems, such

symbols could be manipulated to logically select almost any of the connected jurisdictions. The vested rights-territorial sovereignty approach to PIL was unable to provide the institutional stability in PIL that its adherents claimed it could.¹⁸⁷ From a practical point of view, the theory simply broke down in the face of the intractable facts of the transstate social and power processes. The theory was too far removed from the reality of social interaction to maintain effectiveness. For example, if a claimant's pleadings alleged that an accident was governed by the *lex loci delicti*, he would be asserting that a particular system of law governed the substance of a claim for the allocation of values. He would assume that there is a select jurisdiction that *must* provide the *correct* solution to his claim.¹⁸⁸ The assumption behind such an expectation is that law, or the system of law, exists as a thing apart from the human factor and the reality of decision. Such a perspective paradoxically has an affinity with the legal theory Holmes described as a "brooding omnipresence in the sky."¹⁸⁹ It is difficult to resist the conclusion that these theorists *have* to postulate the existence of a transcendental "strongbox" of legal rules lurking in the selected system which is ready to supply the correct answer to any PIL claim.

It may be worth exploring the unarticulated premises of the vested rights approach: If A and B enter into a contract in State X, at the precise instant that the contract "came into being," a contractual right would vest in the spatial locus of the parties, that is, in State X. In theory the right now has an existence independent of the facts relating to the transaction, unless qualified by various "escape devices"¹⁹⁰ that were invented to ameliorate the impact of the territorial imperative. A vested right is essentially an inchoate right. It has to be spatially grounded in some territorially defined legal regime so that a court, exercising an adjudicatory competence over the parties and the subject matter, may honor it.

One problem with spatially locating the vested right (at the point of its vesting) was that one could, invariably and logically, locate the right in more than one jurisdiction. Just what indices should inform and guide such a discretion in the decisionmaker was unclear. Transs-

187. See *supra* note 181.

188. The claimant's assumption here would be steeped in the classical positivist area of law. See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* (London 1863). J. GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1938); Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605-10 (1908). Cf. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); H. HART, *THE CONCEPT OF LAW* (1961).

189. *Southern Pac. Co. v. Teusen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

190. See *supra* note 181.

tate decision under this framework became a highly fortuitous affair having an attenuated nexus with the stability in expectations about such decision and giving little overt deference to demands for change.

5. The Structural Location of PIL Rules

A further problem pervading the vested rights model of decision related to the PIL rules themselves and their structural location within the juridical paradigm. The dualism problem is that prescriptions like the *lex loci contractus* and *lex loci delictus*, *lex situs* were given an uneasy structural location in the strongbox of legal formalism. Whether these prescriptions are part of the "positive law" of state X, Y, or Z, or considering its transstate character, part of a more inclusive strongbox that transcends the boundaries of a particular state is somewhat unclear. PIL prescriptions, rules and methods appear to be structurally located in domestic prescriptions, that is, as part of the law of a particular body politic in space and time. But PIL prescriptions are also structurally located in an arena of transnational, multicultural significance. In short, conflicts "rules" are of unclear-mystical locus. Most writers appear to endorse the position that conflict of laws prescriptions are a part of "domestic" law.¹⁹¹ They are, however, somewhat more than just a part of the "positive law" of a forum, exclusive to that forum. Structurally, these "rules" are part of a legal process which transcends the interest of any single community. They are a part of a global omnipresence rather than the omnipresence of a single legal regime. Both formulations tend to deny or severely constrict transstate perspectives of control and authority.

The structural dimension, therefore, adds little clarity to analysis for it is important to know just *why* these supposed rules of positive law have to be spatially located so as to vest a right. The quest for "locating the rule" is part of that aspect of formalistic positivism and its eclectic offspring which has attempted to ascertain a criterion of validity; thus the search is for the valid legal rule independent of the decision, or indeed, the social process context. If, therefore, conflict of laws rules are located, that is, the criterion of validity is located in

191. A. DICEY, *THE CONFLICT OF LAWS* (9th ed. 1973).

The second question is an inquiry not as to jurisdiction, but as to the choice of law (*lex*). . . . Each of these inquiries must be answered by any judge, English or foreign, in accordance with definite principles and, by an English judge sitting in an English court, in accordance with principles or rules to be found in the law of England. These rules make up that department of English law which deals with the conflict of laws.

Id. at 4. See also E. RABEL, *THE CONFLICT OF LAWS* (2d ed. 1958); J. STORY, *supra* note 148.

international law, and if international law, at least in its Austinian context, is nothing but a synonym for positive morality, then PIL rules are simply rules of positive morality. Thus, if we were to equate PIL with public international law, we would be relegating, for example, almost all of world trade regulation outside of that governed by treaty law of "unincorporated" customary law, to a veritable legal vacuum.¹⁹²

Dicey ostensibly held the view that public international law was really part of positive morality and was thus to be relegated to a non-law transnational framework.¹⁹³ The same could not be said, however, for the aggregate of outcomes representing PIL. Indeed, it would have been ludicrous to have done so. Dicey, therefore, advanced the view that PIL was essentially a part of the municipal law of a particular sovereignty,¹⁹⁴ and that externally created vested rights were enforceable only insofar as they were permitted to be enforced by the territorial sovereign.¹⁹⁵

6. Intellectual Tasks

The vested rights theorists did not enthusiastically embrace the recommended intellectual tasks of the configurational scheme. Their most notable weaknesses were their opposition to teleology, their near

192. Cf. J. BEALE, *supra* note 176.

193. A. DICEY, *supra* note 191.

The growth of the rules for the choice of law is the necessary result of the peaceful existence of countries governed by different systems of law with the prevalence of commercial and social intercourse. From the moment that these conditions are realised, the judges of every country are compelled by considerations of obvious convenience to exercise a choice of law, or, in other words to apply foreign law.

Id. at 6.

194. *Id.* at 8.

195. Dean Read . . . concludes, after an exhaustive examination of the English and Commonwealth authorities, that "The true basis on which [those] authorities place the recognition of a foreign judgment is that it proves the fact that a vested right has been created through the judicial process by the law of a foreign law district. This basis not only supports and explains the finality requirements and conclusiveness rule; it is implicit in the doctrine of territoriality of law. This, however, is not to say that the . . . common law of foreign judgments gives effect to the so-called vested-right doctrine of conflict of laws to the extent of recognizing every right created by foreign territorial law through the judicial process." . . . [T]he defenses which may be pleaded by the defendant in an action on a foreign judgment, namely, that the judgment was obtained by fraud, or that its enforcement would be contrary to English public policy, or that the proceedings were opposed to natural justice, are all the creatures exclusively of English law. Hence it is apparent that the right which the plaintiff seeks to enforce is a right created by English law and not by foreign law.

Id. at 987-88.

exclusion of predispositional and environmental conditioning factors in decision, and their approach to trend studies. Their implicit predilections were closely identified with stability rather than change.¹⁹⁶

7. Postulation of Goals

Because the vested rights theorists were committed to radically separating law from values and morality, they saw no utility in postulating normative preferences.

8. Appraisal

To more fully appreciate the strengths and weaknesses of this school, it will be constructive to set out a kind of "ideal" vested rights view. When one says: "This marriage is valid everywhere, because it is valid according to the prescriptions of the *lex loci celebrationis*," what is one really saying? In purely formal terms one could be expressing the following: The ceremony in which the parties have participated creates a presumption that a right has been "created" in the beneficiaries to the marriage (contract, sacrament, ritual, pact). In terms of transnational decision, this vested right is the starting point of a legal syllogism. The core framework for creating a vested right is if (A) (precipitating event), then (B) (creation of a right), then (C) (claim relating to a secondary competence); however, the ideal vested rights theory of PIL would be to eliminate (A) from the prescribing process event. By eliminating the social facts, (A), in this framework, one is able to avoid the problem of cross-cultural conflict relating, for example, to the forms, substance and effects of a marriage in a transstate context. A decisionmaker, when faced with a claim relating to a secondary prescribing competence that a foreign marriage be honored for some purpose or other, does not ask: "Why should I honor this marriage?" Rather, he asks whether a right has been vested according to a territorial imperative like the *lex loci celebrationis*. If the right is formally vested, the right vesting the marriage is honored for most purposes.¹⁹⁷ From a theoretical perspective, a number of unstated policy implications and assumptions derive from this model.

First, there is the substantive policy implicit in the idea that marriage units be honored in transstate context. One might ask is it the "give and take" principle of reciprocal tolerances? Is there something anterior to this? An affirmative answer is submitted based upon the

196. What has been set out here is a pure vested rights model. The actual workings of the system have not, of course, been as rigid.

197. See generally *supra* note 176.

belief, perhaps a part of common law tradition, that on a fundamental level, the results of a process of commitment to a marital unit should result in a stability in expectation across state lines. More specific policies to be protected include in such a context: (1) consent representing the ritualized freedom of choice of the parties; (2) honoring the formal aspect of individualism or civic power cross-culturally with the expectation of reciprocity; and (3) effects of the domestic relations process (children, legitimacy, taboos, the transmission of wealth and status through time and space, etc.). These are of course the deeper community policies that the "give and take" comity principle sought to stabilize. In aggregate terms, these perspectives were the events precipitating a claim that a state's law-making power be honored.

Now, the vested rights approach denies the utility of the "give and take" principle, yet its approach to conflict management across group lines was not without merit if one kept primary community policies in view. The idea of a vested right, abstracted in form from social process, avoids in form the overt clash of cross-cultural traditions. It does this by "avoiding," after a fashion, conflicts of substance. This could be very important in periods of transstate crisis. Religious conflict like that spawned by the Reformation illustrates one such example. Conflicts in ideology identified with secular states (inheritance policy under capitalism and socialism, for example) and extant in a particular claim provide another example. In such situations, an important function of the process of decision is the avoidance of expectations of counterproductive chauvinism. The vested rights "formula" assists the decisionmaker in avoiding the "political" problem.

Professor McDougal, somewhat perjoratively, calls this the "squid function." It should be noted that the "squid function" is an ubiquitous and not insignificant function in the decision process. At best, the "squid function" enables a decisionmaker, who is otherwise powerless, to preempt the power process and advance the cause of justice in the individual case. In a totalitarian context, such a competency is an important check upon unbridled coercion.¹⁹⁸ McDougal's "squid function" may be generalized within the broader taxonomy of a configurative perspective about law. The function is one of manipulation of symbolically relevant signs and doctrines as a base and strategem in

198. The term "squid function" is derived from the actions of the sea creature which, in times of peril, disappears within a cloud of ink of its own making. In an analogous manner some members of the judiciary who wish to camouflage their legal reasoning produce arcane and obscure opinions in which they can hide. This process is to be criticized as it fails to clarify the legal issues involved and does not satisfy the common demand for an authoritative decision and a just result in every legal conflict.

the creation and application of law.¹⁹⁹ The PIL function concerned with the management of signs and symbols, however, is to be viewed as an instrumental one. It is not an end; it is a means to an end.

This function has been misunderstood by scholars and decisionmakers socialized to the fundamentalism associated with this perspective. Moreover, advanced techniques in legal research and in the understanding of the interrelationship between law, logic, and social policy made this perspective a painfully inadequate one from an observational standpoint. In historical context, however, the vested rights method was a useful one, its detractors notwithstanding. A protestant decisionmaker did not have to honor Roman Catholic law because it was Roman Catholic law, or vice versa; instead, he simply upheld a "right" that came stripped of any "*weltanschauung*."²⁰⁰ This was a significant contribution to the stability of expectations about value allocations cutting across state and group lines.²⁰¹

A third implication of the model set out above relates to the technique by which foreign law could be an institutionally relevant aspect of the forum's law-making competence. The indirect manner in which this was achieved was significant in deparochializing PIL without provoking a natural tendency in law to be partial to unilateral perspectives. The vested rights methodology—however dysfunctional—performed a significant integrative job, although it paradoxically institutionalized a massive myopia as to what was actually happening. In other words, a decisionmaker could deparochialize the forum's legal culture under the guise of a legal process allegedly bereft of any "*weltanschauung*." The resulting "reification" of concepts such as *lex loci celebrationis* or *lex loci contractus*, supported in this example by *favor matrimonii* or by so true a rule as "party autonomy,"²⁰² could lead to upholding a family unit with the expectation of

199. Karis provides an example of the use of the squid function in modern times. T. KARIS, *THE TREASON TRIAL IN SOUTH AFRICA* (1965). See also Reisman, *Some Observations on the Limits of Totalitarian Power*, 12 ANTIOCH REV. 155 (1952). The Reisman article was developed from an address to the American Committee on Cultural Freedom forum entitled "The Appeals of Totalitarianism." Reisman was a Professor of Social Sciences at the College of the University of Chicago.

200. At a broad level of abstraction the unarticulated "*weltanschauung*" is a commitment to the universality of a religious *weltanschauung* that operates on a more inclusive pattern of identifications. The word *weltanschauung* means "view of the world or of life." MURET-SANDERS ENCYCLOPAEDIC ENGLISH GERMAN 1110 (H. Banman 14 ed. 1910).

201. It should be noted that Professor Ehrenzweig's recent treatise does not seem to treat the etiology of the vested rights concepts as this writer has. A perusal of his views will clearly show areas of contrast and similarity. 2 A. EHRENZWEIG & E. JAYME, *PRIVATE INTERNATIONAL LAW* (special part 1973).

202. "Party autonomy" apparently means "an agreement between adult parties of

reciprocity when it should not be so honored, or vice versa. The exclusion from consideration of basic community policy was bound to lead to the kind of impasse that now epitomizes PIL in the context of family law.²⁰³

D. Modernist Perspectives

1. The Local Law Revolution

The local law revolution was essentially inspired by the American Realist movement.²⁰⁴ One does not have to subscribe to all the tenets of the American Realist movement to realize its enormous impact upon jurisprudential thinking. The spectre of nine old men, making and applying law, was a sobering revelation. So too was the Holmesian insight, that prediction, i.e., what the courts will do in fact, was all that mattered to the legal fraternity;²⁰⁵ and this, moreover, was essentially to be seen from the "bad man's" point of view.²⁰⁶ Results were seen to encapsulate the heart of the judicial process, not mere juridical ele-

equal bargaining power upon the exclusion of the jurisdiction of any country in favor of that of another in a matter devoid of public interest to the contrary." *Id.* at 43.

203. The idea was well expressed by Judge Traynor in *Emery v. Emery*, as follows, "[i]t is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home," 45 Cal. 2d 421, 428, 289 P.2d 218, 223 (1955), in effect avoiding the limping marriage situation. The search was thus to establish a unitary regime on the basis of a series of legal functions about the nature of "legal rights." The registration of affection units does not solve all the choice of law problems.

204. McDougal points out that the principal tenet of the American Legal Realist movement is its "insistence that law is instrumental only to the social ends and . . . it has consistently . . . found authority in peoples' empirical perspectives about social consequences." Lasswell & McDougal, *supra* note 174, at 372.

205. O. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920). In addressing the legal profession at a dedication of a new hall at the Boston University School of Law on January 8, 1897, Holmes explained: "The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts." *Id.* Cf. Bingham, *What is the Law?*, 11 MICH. L. REV. 1 (1913). His perception of the lawyer's role was somewhat similar to that of Holmes. He stated that: "Concrete occurrences to the lawyer are pregnant with the potential sequences which threaten governmental action. His essential business is to predict these future sequences accurately and to induce the desired and guard against the undesired." *Id.* at 11.

For both a critical reaction to Bingham's theory and an attempt to distinguish it from that of Holmes, see Cohen, *Justice Holmes and the Nature of Law*, 31 COLUM. L. REV. 352 (1931).

206. O. HOLMES, *supra* note 205, at 171. He explains:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside

gance or symmetry. "The life of the law has not been logic" said Holmes in his *Common Law*, "it has been experience."²⁰⁷

Along with the crystallization of Professor Beale's jurisprudence of territorial sovereignty, vested rights and legislative jurisdiction, there developed a critical body of Realist inspired scholarship in the conflict of laws area, spearheaded by two Yale law professors, Walter Wheeler Cook²⁰⁸ and Ernest Lorenzen.²⁰⁹ The view that Cook espoused was an essentially critical one—"untheoretical" in many ways, but highly skeptical of *a priori* conceptualism. The problem with evaluating Cook results from the fact that he was primarily an analyticalist—a devastatingly effective one at that—and his function was primarily that of discharge in an intellectually purgative sense. Cook rationalized his position on the basis that the "discharge"²¹⁰ would fertilize the "intellectual garden," free it of "rank weeds" and thereafter "useful vegetables would grow and flourish."²¹¹

At the risk of oversimplification, one might say that the formalistic positivists accepted Story without comity, and that the Realists, in demolishing the conceptualism of vested rights, left one nothing in the way of a coherent, unified and integrated theory about PIL. In this sense, Cook may have been right in saying that his "destructive" scholarship had prepared the way for a newer paradigm.²¹² Currie was prob-

the law or outside of it, in the vaguer sanctions of conscience.

Id.

207. O. HOLMES, *THE COMMON LAW* 1 (1st ed. 1881).

208. Cook's contribution appears to have been the result of an accident, since he never took a law school course in conflicts and missed being indoctrinated in existing fundamentalist dogma. His initiation to PIL came about when he was asked to teach the subject in 1919. Cook was a Professor of Law at Yale in the year 1919 and a Professor of Law at Northwestern University in 1942. He authored a number of works in this area. See W. COOK, *THE ALIENABILITY OF CHOSSES IN ACTION* (1916); W. COOK, *THE ALIENABILITY OF CHOSSES IN ACTION—A REPLY TO PROFESSOR WILLISTON* (1917); W. COOK, *THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS* (1942); W. COOK, *MY PHILOSOPHY OF LAW* (1941); W. COOK, *THE POWERS OF CONGRESS UNDER THE FULL FAITH AND CREDIT CLAUSE* (1919); W. COOK, *SCIENTIFIC METHOD AND THE LAWS* (1927).

209. See E. LORENZEN, *CASES AND MATERIALS ON THE CONFLICT OF LAWS* (1951); E. LORENZEN, *CASES ON THE CONFLICT OF LAWS, SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS* (1924); E. LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAWS* (1947).

210. On the concept of discharge, see generally Lipson, Book Review, 84 *YALE L.J.* 952, 952-53 (1975) (reviewing A.I. SOLZHENITSYN, *THE GULAG ARCHIPELAGO 1918-1956: AN EXPERIMENT IN LITERARY INVESTIGATION* (1974)).

211. W. COOK, *supra* note 81, at ch. IX.

212. Cook's critique of the Story paradigm was ruthless and quite unfair. He zeroed in on Story's use of the sovereignty-territoriality symbols, but had little appreciation for the policies animating the internationalist, comity-directed perspective. Moreover, the culpability for the use and misuse of the sovereignty idea, especially in *reified raimant*,

ably close to the mark when he said that Cook succeeded in discrediting Beale's *Restatement of Conflict of Laws*²¹³ as "thoroughly as the intellectual product of one man can ever discredit the intellectual product of another."²¹⁴

Cook's methods are today a commonplace in any traditional, accredited American law school, where the enormously successful "Socratic" method is used to socialize neophyte lawyers to rigorous analytical thinking. In a sense, the attacks on the "Socratic" method are essentially mirrored in the attacks scholars made on Cook's "destructive" propensities.²¹⁵ The consequences flowing from Cook's lethal pen, however, were tempered by the realization that when the intellect is not overwhelmed by arid conceptualism, PIL decisions are, in reality, "being guided by considerations of social and economic policy or ethics."²¹⁶ Cook held the view that legal decisions demand a consideration of "all the relevant facts of life required for a wise decision."²¹⁷ Cook was committed to practical reason.²¹⁸

Cook's "theory" is itself a modest and not altogether original one.²¹⁹ It derives in part from Judge Learned Hand's "homologous" right theory.²²⁰ According to Cook, a court (forum), having before it a

lies at the door of Western political science and legal culture in general since, at least, the time of Bodin. Story was not the fiend here. However, Cook seemed quite unaware that no matter how ambiguous the sovereignty idea was, one of its core implications was its reference to control and authority in global terms. Story was clearly not insensitive to these realities even if Cook sometimes was. Moreover, one of the crude and brutal truths about the international power process is that territory-land *is* and *does* serve as a base of power. To ignore the interdependencies spawned by the global power process is just as unreal as to ignore the interstimulation of authority structures serving the common interests in optimally preferred ways. Moreover, Cook sometimes recognized the power variable associated with territory when he said "the law of a given state or country can be enforced only within its territorial limits." W. Cook, *supra* note 81, at 41.

213. *RESTATEMENT OF CONFLICT OF LAWS* (1934).

214. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

215. It seems rather unlikely, however, that Cook would have conceded the legitimacy of this criticism. For example, in introducing his "study in 'legal method,'" Cook noted: "It is believed, however, that what has been done . . . is constructive and not merely destructive." W. Cook, *supra* note 81, at ix.

216. *Id.* at 45.

217. *Id.*

218. Compare this with the position of Joseph W. Bingham, the early realist. He states: "The law is an essentially practical matter." Bingham, *supra* note 205, at 3 n.4.

219. See Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822 (1950).

220. See *Guinness v. Miller*, 291 F. 769, 770 (S.D.N.Y. 1923), where Judge Hand expresses his view as follows: "[N]o court can enforce any [law] but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign." *Id.* at 770. *Accord* *Direction der Disconto-Gesellschaft v. United States Steel Corp.*, 300 F. 741, 744 (S.D.N.Y. 1924).

problem with a foreign element, *never* honors foreign law as such. In actuality, a court is *applying* a rule of decision identical with or very similar to that of the foreign law. The court, therefore, never enforced a "foreign-created" vested right, but created rights by making and applying law.²²¹

a. Observational standpoint of the Realists

Generally, Realists felt that law could not be approached scientifically unless one adopted the perspective of the observer, and thereby generated knowledge about rather than of law.²²² This perspective per-

221. See generally W. Cook, *supra* note 81, at 35-36.

222. The realists were really the first to recognize the pivotal significance of this standpoint in jurisprudence. Thus, a very clear-cut distinction emerges in the earliest realistic formulations that designate the essential differences between theorizing *about* rather than *of* law. One early formulation is the following:

[L]et us pause here a moment to determine the attitude from which we are to view the field of law. The judge, presiding over and deciding litigation, is engaged in the art of government. He is making law. The lawyer, who argues a case before judge, jury, or other law determining agency, is assisting in the law-making process. The legislator also indirectly influences similar future processes by the part which he plays in determining the existence and form of legislative expression, which authoritatively indicates what shall or shall not be done in concrete instances. These processes lie in the field of legal study. They are some of its objective phenomena. Therefore to view the field from the attitude of the judge at his official work, or of the lawyer in court, or of the legislator performing his function is, metaphorically, to attempt to see the field from a small spot inside it instead of from above and outside of it. If we are to view the law as a field of study analogous to that of any science, we must look at it from the position of the law teacher, the law student, the legal investigator, or the lawyer who is engaged in searching the authorities to determine "what the law is." These men are not directly acting as part of the external phenomena which compose the field of law. They are studying that field from without and therefore from the position which will give a wholly objective and the least confusing view.

.....
The field of law is far wider and more complex than an imaginary system of promulgated or developed stereotyped rules and principles. It is a field for scientific study analogous to the field of any other science. Concrete sequences of facts and their legal consequences are the external phenomena for investigation and prediction. Knowledge of the causative interrelations of such sequences and of the causes, organization, and operation of the governmental machinery entering into them constitutes knowledge of law in one of the legal senses of the word. Rules and principles have been developed for use in this field and technical terms with definitions more or less stereotyped have been adopted. They are only mental tools which are used to classify, carry, and communicate economically the accumulated knowledge of the law similarly to the use of generalizations and definitions in other sciences.

Bingham, *supra* note 205, at 10-11.

mitted Cook to dissect the traditional PIL perspectives with scientific accuracy and deliver a telling critique of its inadequacies. The participant aspect of scholarship did not, however, occasion an effort to explicitly identify with mankind as such. Broad and apparently liberal identifications were presumably adopted. Fundamentally, Realist scholarship, with exceptions, did not consciously develop a vigorous international perspective.

b. Focus of inquiry: comprehensiveness in conception of community

The local law adherents gave scant evidence of an internationalist perspective.²²³ For this reason, there is no evidence of a comprehensive concept of community in a larger sense.²²⁴ The local law theory provided an appealing, if artificial, homogenous simplicity showing little real concern for cross-cultural comparative investigation. Indeed, such consideration appears to be absent in Cook's work.

According to some theorists, Cook's importance lies in his "realization that the function of conflict of laws is not the preservation of international order but the carrying out of local law and policy."²²⁵ If this is a sound judgment,²²⁶ then the whole character of the international community process with its rich diversity of participants plays a quite peripheral role in PIL. Moreover, the perspective excludes the notion of reciprocal tolerances as an intrinsic component of the decision process; it institutionalizes a quite limited perspective about the community context of decision. Cook's theory seems to give too much credence to the state as the repository of rationality to the exclusion of a broader view of perspectives.

c. Comprehensiveness in conception of law

—Balanced emphasis between perspectives and operations

Cook's theory was an unusual one for a man rooted in the Realist

223. Compare this with the following statement made by Cook on the subject of extraterritorial limitations on the legal process:

Whether international law imposes limitations and if so, what they are, can be determined only by observation. Personally, I can find no consensus among civilized countries upon the matter under consideration; in fact, the utmost diversity of opinion seems to exist. I must, however, leave it to others more competent to speak to say whether my observations are in accord with the facts.

W. Cook, *supra* note 81, at 41.

224. Cook states that territorial organization is not the only form of social organization, although it is a convenient one. *Id.*

225. P. NYGH, *CONFLICT OF LAWS IN AUSTRALIA* 14 (1971).

226. This writer thinks it unsound.

tradition. It was unusual because it was a highly artificial formulation. Taken on its face, the idea that a forum always applies the law "of" the forum, even though it "applies" a rule of decision identical or similar to the rule of decision of another state, comes very close to denying transstate perspectives about authority in PIL.

—Clarity in conception of authority and control

The American Realists acknowledged, however, that human beings make policy and that no meaningful account of patterns of control and authority can be realistic without a proper appreciation of the human element. Yet the superrealistic emphasis of the American school tended to depreciate the utility of the symbol, myth and doctrine in stabilizing expectations about control and authority across group lines. In extreme formulations, the Realists could even be read as denying conceptual thinking. At best, the Realists were masters at the manipulation of signs and symbols of authority. Cook's most enduring methodological contribution was to demolish the mystical connection between "locus" and "right." Once a claim precipitating event was thawed from being frozen in a particular spatial locus, the conceptual pathway was opened for a much more functional approach to PIL decision. As Cook put it, "[H]ere, as elsewhere, the basis must be a pragmatic one—of the practical working rule."²²⁷

d. Classification of decision: public order, constitutive, civil order

It is paradoxical that Cook purported to provide, through PIL, a quite unvarnished picture of certain phases of the international legal process and its animating symbols. He erroneously believed that control and authority did not exist in global terms outside of the realities of state power. He came almost as close as the Austinians in believing the myth of a non-law framework for PIL. As a result, public and civic order priorities, as well as the constitutive dimensions of decision, were left undeveloped for the larger global community.

e. Intellectual tasks

A great debt is owed to the Realists for their eclectic operationalization of a number of the recommended intellectual tasks. Some of these legal functions were consciously accomplished while some were performed by accident. But this much is certain: Their methods, particularly their emphasis on rule and fact skepticism, and their insistence on understanding real conditions of claim and decision supplied

227. W. Cook, *supra* note 81, at 45.

the foundation for a much fuller and more scientific appreciation of the interrelationship between decision, community process and preferred social goals.

f. Postulation of goals

The local law theorists were an essentially relativistic group. They preferred not to postulate goals, although their work implies not only a minimum order but also a situational sense of justice. Moreover, even here they could not conceive of power and constitutive processes beyond the particulars of their own state. They did show, however, that someone's preferred choice was extant in all legal decision.

g. Appraisal

Unfortunately for PIL, the proponents of the "local law theory" gave scant guidance as to how, and by what criteria, conflict of laws problems could be solved. Nor did they attempt to clarify fully the objectives of this branch of law. Their skepticism of grand theory, their partiality to result selection and social expediency, their reliance on the "hunch," or the common sense features of justice in the individual case, indeed, their total or near total partiality to a severe juridical strain of nominalism, seems to have retarded the replacement of the vested rights approach with a more coherent theory about PIL. It should be said, however, that their work did suggest a way out: functionalism.²²⁸

2. Currie, Cavers, and the Legal Process Paradigm: Governmental Interest Analysis and Legal Process²²⁹

Two of the most influential "restaters" of the local law theory were

228. A sophisticated realist statement of the functional approach is to be found in Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). "Legal criticism is empty without objective description of the causes and consequences of legal decisions. Legal description is blind without the guiding light of a theory of values." *Id.* at 849. Cf. Cohen, *The Problems of Functional Jurisprudence*, 1 MOD. L. REV. 5 (1937). See also McDougal, *Fuller v. The American Realist: An Intervention*, 50 YALE L.J. 827, 835-36 (1941). "[T]hey [the realists] have been hard at work for the achievement of certain humanitarian and democratic ideals of intermediate or relatively low-level abstraction." *Id.* McDougal has, of course, transcended the "binding" character of these low-level abstractions that have so disastrously castrated the promising start the realists portended.

229. American scholarship in PIL in the postwar era has been extraordinarily rich and stimulating. Needless to say, this is a very distinguished group. The leaders include, in addition to Currie and Cavers, Reese, von Mehren, Trautman, Nadelman, Baade, D. Currie, Cramton, Rosenberg and others. See generally H. BAADE, *THE SOVIET IMPACT ON*

Professors Currie²³⁰ and Cavers.²³¹ Their work incorporates elements of a post-Realist perspective. This is a perspective of law whose pervasive influence in the current trends of American legal culture should not be underestimated. This section will provide a critique of this point of view using essentially Professor Currie's governmental interests analysis as the primary target but retaining for criticism those areas that Professor Currie and Professor Cavers share. The second part of this section will concentrate upon Professor Cavers because his book, *The Choice of Law Process*,²³² brings into sharp focus the strengths and limitations of the legal process paradigm as Cavers has sought to develop it in PIL.

a. Governmental interests analysis: the theory

The fundamental contribution of Professor Brainerd Currie's governmental interests analysis approach to PIL lies in the recognition that in this system, many conflict of laws cases pose false problems. Hence, Currie's key distinction is between those problems that are basically "false" conflicts and those that are "true" conflicts.²³³ Currie believed that the vast majority of choice of law cases really posed false problems and that the governmental interests methodology that he developed would identify and dispose of them without the tortuous intellectual baggage of the vested rights approach, while producing more sensible results.²³⁴

INTERNATIONAL LAW (1965); R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS, CASES—COMMENTS—QUESTIONS (3d ed. 1981); K. NADELMAN, CONFLICT OF LAWS: INTERNATIONAL AND INTERSTATE (1972); W. REESE & M. ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS (6th ed. 1966); R. VON MEHREN & W. TIMMENG, FOREIGN CORRUPT PRACTICES ACT: 3 YEARS AFTER PASSAGE (1981).

230. B. CURRIE, *supra* note 214. See generally B. CURRIE & N. HEALY, CASES AND MATERIALS ON ADMIRALTY (1965).

231. D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965); D. CAVERS, *Oral Contracts to Provide by Will and the Choice-of-Law Process: Some Notes on Bernkrant*, in PERSPECTIVES OF LAW—ESSAYS FOR WAKEMAN SCOTT 38 (1964); Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732 (1963).

232. See *supra* note 231.

233. B. CURRIE, *supra* note 214, at 188-91. See also *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974) (forum state's law applies when foreign state is "disinterested" since its limitation on damages law is intended to protect only its own resident defendants); *Lilienthal v. Kaufman*, 239 Ore. 1, 395 P.2d 543 (1964) (forum state's law applies even though both forum and foreign states have a substantial interest in the litigation as evidenced by the public policies underlying their statutes). Cf. *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961) (foreign state's law applies in order to protect the reasonable expectations of the parties to the contract).

234. B. CURRIE, *supra* note 214, at 180-87.

According to Currie's theory, a choice of law problem was ostensibly false when a judge prescribed the law of a state to a particular problem in which that state had no rational "interest" in having its law advanced.²³⁵ Correlatively, a false conflict also existed when the judge applied the law of the forum to a problem in which it had no governmental interest to advance and did so at the expense of another "interested" state.²³⁶ The identification of a requisite governmental interest is essentially a limited factoral exercise that establishes a logical or causal nexus among the parties, the states of primary affiliation of the parties, and a "zone of interest" of the relevant substantive laws delimited in the case.

*Walton v. Arabian American Oil Co.*²³⁷ provides an uncomplicated example of Currie's view. In *Walton*, the plaintiff was injured by the defendant in Saudi Arabia.²³⁸ The plaintiff was an Arkansas citizen; the defendant was a Delaware corporation doing business in New York.²³⁹ Walton sued the defendant in New York, failing to plead or prove Saudi Arabian law.²⁴⁰ When the case reached the Court of Appeals for the Second Circuit, the court ruled that the plaintiff had failed to plead a cause of action because of his reliance on a form of action recognized by the forum.²⁴¹ Currie's primary point in this case was that an interested state had its law effectually displaced by the *lex loci delicti*, making an uninterested state (Saudi Arabia) create law for this problem in a most axiomatic manner, or as Currie put it, by the "mere logic of the system itself."²⁴²

In slightly modified ways, therefore, Currie sought to demonstrate that the vast majority of so-called conflict of laws issues were false problems. According to this theory, the New York court advanced a Saudi Arabian governmental interest in a situation where Saudi Arabia

235. *Id.* at 188-91.

236. *Id.*

237. *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956).

238. 233 F.2d at 542.

239. *Id.*

240. *Id.* Under New York State's rules of conflict of laws, the applicable substantive law to an alleged tort is the law of the state where the injury occurred; in this case, that would be Saudi Arabia. Under general federal rules, the law of a foreign country is a fact which must be proved. *Id.* at 543.

241. *Id.* at 546. Under the New York Civil Practice Law and Rules, the court would abuse its discretion if it were to take judicial notice of a foreign law not pleaded by the plaintiff when that law is not easily comprehended. N.Y. CIV. PRAC. R. 4511 (McKinney 1963); *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541, 544 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956).

242. B. CURRIE, *supra* note 214, at 5.

had no interest in having its substantive law govern liability for the alleged tort. Currie tried to show that most conflict of laws problems (in terms of his methodology) invariably involved the "exclusive" concern of a particular body politic; to apply the prescriptions of another state, if different, would be the most basic form of irrationality. A decisionmaker in such a posture would, in effect, be advancing the governmental interests of a state that had no interest in having its law applied. The false conflicts distinction has shown some functional utility and has been more or less accepted by writers like Cavers,²⁴³ Baade²⁴⁴ and Weintraub.²⁴⁵ What Currie proposed in cases of "true" conflicts is more problematic.²⁴⁶ Currie's suggested solution was that a forum be restrained and enlightened.²⁴⁷ Other scholars have seen bolder challenges and have suggested such concepts as "the better rule approach"²⁴⁸ or in the case of Professor Cavers, "principles of preference."²⁴⁹

b. Currie's methodology

Currie developed a five step methodology for solving PIL problems.²⁵⁰ The first step was that a court should normally be ex-

243. See *supra* note 231. See also Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 TEX. L. REV. 141, 150 (1967) (Cavers appears to agree with Currie "on the disposition of true conflicts cases in an interested forum").

244. Baade, *Foreword to New Trends in the Conflict of Laws*, 28 LAW & CONTEMP. PROBS. 673 (1963); Baade, *Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)*, 72 COLUM. L. REV. 329 (1972).

245. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (2d ed. 1980).

246. B. CURRIE, *supra* note 214, at 190-91.

247. *Id.* at 186.

248. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1587-88 (1966). Choice of law is not simply a matter of choosing a jurisdiction but, also, a determination of which law makes "good socio-economic sense for the time when the court speaks." *Id.* at 1587. Judges' preferences for the forum state's law reflects a conviction that these are better laws than other states' laws. *Id.* at 1588.

249. D. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965). Cavers' seven principles of preference, five relating to torts and two relating to contracts, are guides to judicial decisionmaking in true conflicts. The purposes underlying certain aspects of laws (e.g., standard of conduct) and the attribute of territoriality were considered in the formulation of the principles. For example, principle one provides that if the state of injury sets a higher standard of conduct or of financial protection against injury than the state where the actor resides, the laws of the state of injury apply so long as the person injured was not related to the actor. *Id.* at 139. Under principle two, the laws of the state of injury again apply if they prescribe a lower standard of conduct than the state where the actor resides. *Id.* at 146. Both principles imply a recognition of a territoriality attribute that a state will protect people and property within its borders. *Id.* at 139-40.

250. B. CURRIE, *supra* note 214, at 183-84.

pected to apply its own law to any case having a foreign element.²⁵¹ The implied assumptions here were first, that the pleadings of the parties did not assert or assume the "relevance" of the foreign community's prescription. Thus, a court would be responding to the demands and expectations of the litigants as if it were guided by the techniques of issue-joinder associated with the litigation process itself. The other assumption is that courts are best suited to make and apply their "own" law.

The second step relates to the situation where one of the parties asserts in the pleadings that the law of a foreign state should furnish the rule of decision. When such a claim is made, the court should, according to Currie, "inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy."²⁵² This policy was to be ascertained by the ordinary processes of construction and interpretation. These processes are, of course, by no means "ordinary" and involve intensely debated jurisprudential questions. Whatever Currie may have implied in this regard, he was clear about his own jurisprudential perspective. He regarded himself as a sociological-functionalist and saw the task of interpretation as effectuating a basically "legislative purpose."²⁵³

The third step involved the ascertainment of the policy expressed by the relevantly connected foreign law and the significance of the "reach" of that law to the problem at hand.²⁵⁴ Step four involved the elimination of the state whose prescriptions were irrelevant to the case and the application of those prescriptions which were relevant to the decision.²⁵⁵ The fifth and perhaps most controversial point was that when a forum had a "reasonable" (in Currie's terms) basis for applying its own law, it should do so to the exclusion of the other relevantly connected state's prescription.²⁵⁶ This last proviso was considerably ameliorated in Currie's later writings.²⁵⁷

It is evident that these methods, although a notable improvement upon the void left in the aftermath of the realist revolution, had dis-

251. *Id.* at 183. There are a number of threshold problems involved in Currie's first step, but these points will be reviewed in a later section. *See infra* text accompanying notes 260-62.

252. B. CURRIE, *supra* note 214, at 183.

253. *Id.* at 184.

254. *Id.*

255. *Id.*

256. *Id.*

257. *See* Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754 (1963); B. CURRIE, *supra* note 214, at 538-39.

tinctive limitations which Currie himself was the first to admit. Indeed, Currie sought to follow through on the Realist critique of conflict of laws "rules" by urging that the entire conceptual edifice be reduced to ashes, rather than merely be purged of rank weeds. Currie despaired that a new paradigm would, however, in phoenix-like fashion, arise from the ashes. He put it in these words:

We would indeed do well to scrap the system of choice-of-law rules for determining the rule of decision, though without entertaining vain hopes that a new "system" will arise to take its place. We shall have to go back to the original problems, and to the hard task of dealing with them realistically by ordinary judicial methods, such as construction and interpretation, and by neglected political methods.²⁵⁸

The outstanding virtue of Currie's governmental interests analysis was its focus upon the clarification of the "relevant substantive policy" of the bodies politic whose laws were in ostensible conflict. Such a focus was no small accomplishment, but the method does not go far enough.²⁵⁹ Clarification of policies dealing with a public order system that transcends the framework of a particular state and includes significant transgroup perspectives of authority and control, requires much more than a mere ascertainment of legislative purpose within a discrete community which may be mythical and is, in any event, highly problematic in law. As Cook and others have suggested, a broader understanding of decision-making would seem to be crucial to the enterprise.

c. Observational standpoint

Currie retained a sophisticated perspective about some aspects of the observational standpoint. The same is, in large measure, true of Cavers. Professor Baade has rightly observed that

both for Cavers and for Currie, the governmental-interests ap-

258. B. CURRIE, *supra* note 214, at 185.

259. Focus on policy content requires using the method of comparative justice. If adjudication is conditioned by functional, rather than formalistic perspectives, this approach opens a pathway to a comparative law aspect in PIL that stresses the significance of functional equivalents and disequivalents in the prescribing process as well as homogenizes the content of PIL through the search for the deep structure of prescriptive equivalents—the so-called common core of legal prescription. Furthermore, the approach could be used to stress a sensitivity to emerging standards of international justice associated, *inter alia*, with human rights. Currie, of course, did not go this far. He was neither a comparativist, nor an international lawyer. Nonetheless, his approach can be read as at least suggesting the potential relevance of these issues.

proach is "academic." While both authors sought—and found—some justification for their theories in past decisions, and while everybody is gratified by seeing his views accepted by the courts, the main objective is the development of a method about which it can be said that "we should all be better off if my hypothesis had, indeed, been the principle actually informing the decisions of the courts." Conflict-of-laws questions are amazingly complicated, and they are, probably in good part for this very reason, rather infrequently litigated. It thus seems essential that the scholar pave the way for the judge in this area.²⁶⁰

It was this "academic" approach which, in reality, served as the rough approximation of an observational standpoint that led Currie to urge that the fundamentalist approach was so bankrupt that the entire myth system "of" law be scrapped and that "real" problems serve as the prime condition for decision. What seemed less explicit in Cook became thoroughly explicit in Currie's formulation.

Currie, perhaps more than any other conflicts theorist, cleared the conflicts garden for a meta-theory about PIL which had a distinct policy-directed focus. But this realistic appreciation of law in relation to social process, crucial to the observational standpoint, was severely undermined by other weaknesses which seemed to afflict Currie's theory. First, Currie did not distinguish the academicians or the scholars' perspective sufficiently or consistently from that of the active decisionmaker.²⁶¹ This inadequacy may have prevented him from developing more fully a theory about PIL that would include transstate perspectives as an indispensable component of theory. Second, Currie's conception of the allocation of role-competencies between judges and legislators was very structured and did not adequately explore the role of judges or other decisionmakers in multistate situations. This conception, in turn, had a dramatic effect upon his maintaining a consistent "observational" standpoint when he needed to do so.

These problems emerged in Currie's earlier essays²⁶² where he ap-

260. Baade, *supra* note 243, at 145 (footnotes omitted). Professor Baade agrees on the advantages of the "academic" approach. "There is no need to manhandle precedent until it falls in line with the new scheme, nor is there any necessity for the use of question-begging formulae that are to receive their specific contents through future decisions." *Id.* at 146 (footnotes omitted).

261. The problems that we alluded to earlier seem to have compelled this perspective. See *supra* text accompanying notes 96-120.

262. See B. CURRIE, *supra* note 214, at 9.

The English practice, whereby the law of the forum furnishes the rule of decision until it is displaced by a different law with a greater claim to recogni-

peared to merge, within the structural limits of the judicial role that he thought appropriate, the perspective of scholar with that of the judge as decisionmaker. Note here the confusion caused by role identification with judges and the simultaneous assumption of a standpoint outside of the system in order to prescribe the appropriate role-designation. The nature of the subject compels that the scholar's standpoint be identified with a theory about PIL. These problems emerged more acutely in Currie's later essays.²⁶³

d. Currie, governmental interests and the judicial standpoint

Currie's early essays appeared to merge the standpoint of the observer with that of the judicial decisionmaker to the detriment of clarity for both roles. He did this by ascribing structural-functional limitations to judicial lawmaking in his role as a scholar. In the formulation of his governmental interests perspective, Currie largely merged the standpoint of the disengaged observer with that of the judge. He delimited the functional capability and role-structure of the judge by asserting the primacy of constitutive foundations of the separation of powers myth and by the moral axioms associated with representative democracy.²⁶⁴ Having done this, the standpoint shifted to that of a par-

tion, brought forward by a party wishing to take advantage of the difference, seems normal and natural. It has something of the quality of soundness that one associates with a house that has been designed skillfully in terms of its relationship to the physical characteristics of its site. This is a rule of law admirably adapted to the facts of its environment. Lawyers and judges are ordinarily schooled in their own domestic law. Day in and day out they think, advise, and argue and dispose of cases in terms of that law. They develop familiarity with its provisions and sometimes expertness and even insights concerning it. They are prone, at least according to a widely held belief, to overlook the significance of foreign facts and to proceed in accordance with local law in many instances in which attention to the foreign law would have produced a different result. The intrusion of foreign law is an unsettling departure from routine, involving even under ideal conditions some encounter with the unfamiliar, some departures from usual procedures, some additional burden; and there are situations in which the degree of unfamiliarity and the burden of understanding can become oppressive. To say that there is a strong presumption favoring the application of the law of the forum until good cause is shown why it should not be applied is to give prescriptive form to an observation of behavior that has something in common with Newton's laws of inertia.

Id. (footnotes omitted).

263. See *infra* notes 267-78.

264. Thus, Currie stated:

Where several states have different policies, and also legitimate interests in the application of their policies, a court is in no position to "weigh" the competing interests, or to evaluate their relative merits, and choose between them accordingly. This is especially evident when we consider two co-ordinate states, with

tially disengaged observer. For false conflicts, therefore, one was not entirely disengaged but had to apply the law of the forum if one's state had a legitimate reason for doing so. If there were no interests being advanced in applying forum law, one then had to apply the law of the group whose interest would be advanced—a peculiarly atomized concept of transgroup interest. Currie added that if two states are involved in a problem designated as a “true conflict,” the decisionmaker had to abstain. This he designated as “political” decision-making of a high order. He therefore questioned whether judges ought to be charged, as a matter of principle, with the discretion to make the kinds of choices that such problems require. He appeared to argue, in effect, for a conservative approach to judicial decision-making in this arena or for the displacement of any judicial discretion where the choice of law problem involved a conflict of statutory law or perhaps uncoded common law.²⁶⁵

The quintessence of governmental interest analysis, therefore, is that the legislature is functionally geared to the making of law because of the resources and institutions at its disposal such as the legislative committee system. Judges, on the other hand, are seen to apply law, but they are functionally *limited* by the resources and capabilities of counsel in the adversary system and the moral-ethical conventions attendant upon democratic decision-making.²⁶⁶

such decisions being made by the courts of one or the other. . . . But when the court, in a true conflict situation, holds the foreign law applicable, it is assuming a great deal: it is holding the policy, or interest, of its own state inferior and preferring the policy or interest of the foreign state. . . . [T]he task is not one to be performed by a court. I know that courts make law, and that in the process they “weigh conflicting interests” But assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy. It is a function that the courts cannot perform effectively, for they lack the necessary resources. . . . This is a job for a legislative committee, and determining the policy to be formulated on the basis of the information assembled is a job for a competent legislative body.

B. CURRIE, *supra* note 214, at 181-82 (footnotes omitted).

265. *Id.* at 177-87.

266. *But see* Reese, Book Review, 16 U. TORONTO L.J. 228, 232-33 (1965). Reese states:

With all respect to Professor Currie, it seems clear that a legislature is not well equipped to handle (questions as to competing state interests). Of necessity, a legislature can legislate only on a plane of some generality. But, as Professor Currie rightly points out, generalities must be avoided like the plague in choice of law . . . and questions should be decided, at least initially, on a narrow basis. Only a court can tailor its decision to the needs of the particular case, and only by proceeding on a case-to-case basis can there be hope of ultimately developing

It is evident that Currie sought to clarify the judicial and legislative competence in functional terms and relate this to PIL. He appears not to have clearly located himself, however, in terms of the scholar's identifications and objectives. His primary identification seems to have been with that of judge as decisionmaker and the legislator as decisionmaker. His primary objective, as he admitted, was a functional, teleologically oriented conception of what he thought a state's governmental interests were. These interests, he maintained, were to be ascertained by the ordinary processes of interpretation and statutory construction although the judicial role appears to have become somewhat more significant in Currie's later writings.²⁶⁷ According to Currie

to assert a conflict between the interests of the forum and the foreign state is a serious matter; the mere fact that a suggested broad conception of local interest will create conflict with that of a foreign state is a sound reason why the conception should be reexamined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate a forum's legitimate purpose.²⁶⁸

His perspectives, however, remained closely identified with those of the legislature and the judiciary. Yet, in assuming these identifications and objectives, Currie, at the same time, unconsciously sought to establish for himself the observational standpoint of the scholar with a more inclusive, if inarticulate, sense of "justice." In this connection, Currie's

satisfactory rules of choice of law. If the job is to be done at all, it will almost surely be done by the courts and not by the legislature. Indeed, Professor Currie is quite frank in stating that the legislature can hardly be expected to deal comprehensively with these matters.

If the job is to be done at all, it must be done by the courts. The real question is whether there should be any weighing of interests in choice of law or, more specifically, whether there should be a weighing of competing state interests and a weighing of a state's interests in the application of a particular rule against its other more general interests. Professor Currie would be quite content to eschew all efforts of this kind and simply to have the court apply its own local law whenever the forum state has a legitimate interest of its own to protect. This would be done, for example, even though some other state had a far greater interest in the matter and even though application of forum law would defeat the expectations of the parties. To accusations of defeatism and negativism, Professor Currie replies simply that the courts cannot be expected to do more.

Id.

267. The verdict of Professor Currie's quiescent years required him "perhaps, to sand down the sharp edges of the position that the courts are not equipped to make decisions that are essentially political in character." B. CURRIE, *supra* note 214, at 627.

268. Currie, *supra* note 257, at 757.

comments on *Grant v. McAuliffe*²⁶⁹ illustrate his sense of justice. This decisionmaker, Justice Traynor, had embraced the governmental interests approach. When the statements of Currie are read in conjunction with the statements of Justice Traynor, they bring to the fore a number of important issues relating to scholarly and decisional roles. Although in this instance the scholar has recommended after the fact, his general orientation appears to vindicate the necessity of an observational standpoint. On the other hand, Justice Traynor has attempted to develop the cultural perspective normally associated with the scholar in understanding the significance of *his own* past decisions. Scholars, in this context, appear to unconsciously interchange their identifications and objectives with decisionmakers and, in significant instances, decisionmakers might assume the standpoint of the observers.

This critique underscores three simple points that continuously recur in PIL. First, the problem of standpoint in PIL is important to both the scholar and the active decisionmaker. Second, the relative inclusivity or exclusivity of the pattern of identification of both the scholar and decisionmaker has a very real and direct impact upon actual decision-making because PIL claims require responses grounded in theories that transcend notions of law as defined solely by statist considerations. In a sense, what is demanded is a meta-judicial perspective. Finally, the complexity of these problems may play havoc with concerned participants because of the demands of multiple identifications about the self-system and because of the extraordinary demands of role-structure and role-function in the larger comparative, transnational arena.²⁷⁰ Indeed, these complexities could not ultimately be avoided by the theorists associated with governmental interests

269. 41 Cal. 2d 859, 264 P.2d 944 (1953).

Now, what happened in the *Grant* case is pretty clear. The judges fed the data into the machine in the usual way, but, when the machine's answer came out, they couldn't swallow it. They rebelled against the machine. They *adjudicated* the case. Using discretion and intelligence, and having regard to the fact that it was a lawsuit they were trying, they looked for a result they could live with. . . . So they decided the case *their way*. This was a kind of insubordination on their part, of course. . . ."

B. CURRIE, *supra* note 214, at 138-39. See also Justice Traynor's afterthoughts on *Grant*:

It may not be amiss to add that although the opinion in the case is my own, I do not regard it as ideally articulated, developed as it had to be against the brooding background of a petrified forest. Yet I would make no more apology for it than that in reaching a rational result it was less left than it might have been to quit itself of the familiar speech of choice of law.

Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 670 n.35 (1959).

270. See, e.g., McDougal, Lasswell & Reisman, *supra* note 44, at 199-202.

analysis. The climax emerged because of what was thought to be a juridical "Okapi": the neutral forum. Professor Currie gave extended treatment to this problem which he characterized as the problem of the disinterested third state. According to this school, the decisionmaker in the "normal" PIL situation would, with differing emphasis, be subordinate to legislative control. Indeed, the role of a judge in a democracy demanded no less. In a peculiar way, therefore, the judge seized with the problem in forum A, involving in sharp juxtaposition the prescriptions of forum B and forum C as being most governmentally interested in the application of their own prescriptions, would find himself in a situation calling for a role in which the "academic" dimension would have to produce results. Here the "disinterested" forum had no interest of its own to advance and *had* to choose between interests of the other interested states. There was *prima facie* no idea of honoring an interested state's law without "offending" at least one interested state. For Professor Currie, the solution to this problem lay in the empirical datum that such cases were rare. He also seemed to qualify the omnipotence of *lex fori* principles in these "true conflict" situations (even where the forum was not a neutral one) with the theorem that the courts ought to be restrained, more moderate, and enlightened when operating at this level.²⁷¹

But Currie did note that if a more moderate or restrained construction did not resolve the problem; if the problem could not be dismissed because of the obligation to provide a forum; if it could not be avoided by deft construction; and if indeed it was unavoidable, then: "I confess I cannot see where all this ends. We are discussing a problem of infinitesimal practical importance; a statutory remedy is proposed that would lead to fantastic complications. Surely the part of wisdom is to wait for the courts to gather more experience with the problem."²⁷²

This theory could not account for true conflicts in a neutral forum or the class of problems designated as "unprovided for" cases. In effect, the implications of this perspective on a decisionmaker are of this order: (1) find out what the legitimate interests of *state A* are; (2) find out what the legitimate policies of *state B* are; (3) find out if your state has any interest and if not, you are "disinterested"; and (4) if you are "disinterested," as defined and the "laws" of A and B differ on the allocation of values contingent upon discharge of decision—work it out for yourself for there is no one to help you with criteria of choice.

The principal flaw in the standpoint of the governmental interests

271. See Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754 (1963); B. CURRIE, *supra* note 214 at 120, 606-09, 721.

272. Currie, *supra* note 271, at 793.

school²⁷³ was that it seemed to operate upon the essentially dualistic myth of statism associated primarily with the Dutch School. The governmental interest perspective assumed a concept of the community power process (state sovereignty) that is deemed to be not only omnipotent, but also the repository of contemporary rationality. What this exclusivist perspective overlooks is the importance of accounting for and perhaps identifying with the rich plurality of global community participants from the local to the most comprehensive.²⁷⁴

- e. Focus of inquiry: comprehensiveness in conception of relevant community

Currie did not develop a comprehensive concept of community transcending discrete groups and bodies politic. He was not, however, altogether insensitive to this criticism; he felt that it was more impor-

273. It should be noted that Currie took an essentially "sociological" approach to his analysis of PIL problems. Many of the criticisms leveled at the inadequacies of the diverse standpoints implicit in the work of various writers identified with the sociological school are germane to the governmental interests school. See generally McDougal, Lasswell & Reisman, *supra* note 44, at 262-63 (discussion of the perceived deficiencies in sociological jurisprudence).

274. Myres S. McDougal has refined an earlier formulation of such an observational standpoint. It is particularly appropriate in this context:

The applier or other evaluator should make himself as conscious as possible of all the different communities, from global to local, of which he is a member and upon which his choices must have unavoidable impacts. His most appropriate identifications are with all these communities, concentric in their geographic reach and interpenetrating in their value processes, and his primary concern should be that his choices take into account the aggregate consequences for all these communities and reflect their common interests. The aspiration of an applier who represents a community whose basic constitutive process projects a comprehensive public order of human dignity—as is increasingly sought in the contemporary human rights prescriptions—and who is himself genuinely committed to this goal, should be to make his every particular application of authoritative prescription contribute to progress toward this goal. Such an applier will recognize that, in a global interdetermination of all values, there is indeed a human rights dimension to all interaction and decision, and will make every effort to insure that such dimensions are effectively taken into account in decision. This recommendation, it may require emphasis, is not that a decision-maker assume the license to impose his own unique, idiosyncratic preferences upon the larger community. It is, rather, a demand that the decision-maker identify with the whole of the communities he represents and that he make a systematic, disciplined effort to relate the specific choices he must make to a clarified common interest, specified in terms of overriding community goals, for which he personally can take responsibility.

McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 VA. J. INT'L L. 387, 396-97 (1974) (footnote omitted).

tant to demolish whatever residue had escaped the reach of Cook's devastating pen. In this aspect, Currie's theory was further emaciated by the assumptions about community process that he accepted as the factual preconditions for his system. For example, Currie, like Cook and the other realists, considered the contemporary structure of social organization to be primarily located within the state system in somewhat undynamic terms.²⁷⁵ The restricted "*lex fori*-type" focus was convenient for the clarification of a limited arena of policy concern. It did not, however, focus on the structure of value process transcending states both horizontally and vertically. Thus, it understated the realities accompanying the integration of social processes in the more inclusive arenas of decision that epitomize the PIL context. The realities, therefore, of interdependence and interdetermination were not adequately accounted for in this perspective. It is precisely at this point, it is submitted, that Currie went wrong. Once he had limited his focus about community process to fit his concept of the *lex fori*, thereby creating a "pill-box" taxonomy for the transgroup process, he could define interests in almost "pill-box type" fashion as well. *This led him to conceive of the spurious distinction between "interested" and "disinterested" governmental interests without a properly contextual appreciation of all community interests relevant to the public order, both inclusive and exclusive.* In short, the concept of community Currie envisioned did not give a proper account of the spatial reach of interpenetrating relevant power processes; indeed, it was not broad enough to account for these value processes or the diverse range of participants animating these intersecting and interacting processes; it did not seek to account for *aggregate consequences* of choice relevant to the *common interests of all affected communities*. Currie unfortunately lacked a truly transnational concept of community in a more functionally inclusive sense.

f. Comprehensiveness in conception of law

—Balanced emphasis between perspectives and operations

In sacrificing the transnational perspective, Currie could not adequately exploit the strong points associated with his approach to operations. If this imbalance is glossed over, however, Currie's methodology still demonstrated, with powerful results, that policy is *the* most useful instrument for informing decision in PIL and that policy could be operationalized and applied to the microdetailed instances of decision

275. It is at this point that an awareness of the process of consociation would have been most useful to these scholars.

in the so-called "private" law domain. Currie may be seen as having, in some measure, brought a kind of phenomenological perspective to PIL theory.

—Clarity in conception of authority and control

Professor Currie clarified his concept of law as follows:

Law is an instrument of social control. Recognition of this fact, and emphasis on the economic and social policies expressed in laws, would lead to a fresh and constructive approach to conflict-of-laws problems. But law is not an instrument of social control alone. It retains something of the quality and function that were commonly attributed to it before we became so acutely conscious of its sociological role.²⁷⁶

Writing in specific reference to the common law, Currie declared: "We realize now, of course, that the common law itself is an instrument of social and economic policy."²⁷⁷ The clarity of Currie's conceptions of PIL as a process of authoritative decision transcending discrete groups was colored, as has been suggested, by his concept of the state and the separation of powers doctrine.

Currie described his approach as sociological, although what he meant essentially was sociological in the teleological sense. But these goals were for Currie not a matter of scholarly speculation, but rather a policy to be found in the prescription of state elites. Hence, governmental interests were, within limits, what state elites said they were. The function of the judicial decisionmaker was, therefore, to ascertain what the policies implicit in prior policy-making really incorporated, and to apply these policies to particular cases. Currie was attacked on this point. To use one illustration, Professor Baade seemed to read Professor Ehrenzweig as undertaking "to banish teleology and policy from private law."²⁷⁸ According to Baade, "[g]overnmental interest analysis is merely one of the many applications of teleological interpretation. It seeks to determine the pertinence of rules of law to multiple-contact cases through an analysis of the *purposes behind these rules*."²⁷⁹

Two simple questions underscore the major difficulties inherent in Currie's formulation. First, what does one do when another body politic asserts a concurrent reasonably founded competence to apply and

276. B. CURRIE, *supra* note 214, at 64.

277. *Id.* at 65.

278. Baade, *supra* note 243, at 149.

279. *Id.* (emphasis added).

prescribe policy? Second, what if the policies identified with one or both of these states are a *prima facie* violation of a preemptory norm of international law or human rights?²⁸⁰

Currie's response to these problems may be summarized as follows: In a democracy, judicial decisionmakers in the PIL arena have no legal power to choose between the prescriptions of two competing states because state policy is justified on the moral grounds of representing the consent of the governed and upon the functional allocation of certain competences to legislators. The problem with this formulation is that, in the PIL arena, not all states can preempt the legitimizing symbols of representative democracy and, to be consistent with the assumptions implicit in this approach, one might not give deference to groups whose political culture appear undemocratic, even when it would promote human dignity to do so. Second, the problems of democracy are never simple. Indeed, the disposition of power in any society is complex and the total moral equation relevant to power and influence²⁸¹ may have to be accounted for before one can reach the question of "whose interests" have preempted all the symbols of moral rectitude inherent in the terms "governmental" or "state." This means that a realistic map of the social and power process transcending discrete groups will have to account for participants like pressure groups, political parties, lobbies, individuals in various role patterns and so forth. To avoid these realities by adopting an all too rigid distinction between the interested and the uninterested is to impose formalism on international decision of the kind that Currie himself would have inveighed against.²⁸²

This ground for limiting the policy focus of control and authority is not compelling, particularly in the context of PIL, where the demand for reciprocal tolerances directly impacts upon the production and distribution of values for identifiable litigants, and where the aggregate flow of such outcomes may show PIL to be one of the most important mechanisms for shaping the global value processes in positive ways. Moreover, Currie's own emphasis upon the relevance and reach of the equal protection clause in the PIL context shows that he was sensitized

280. See B. CURRIE, *supra* note 214, at 526-83. Here Currie sought to adumbrate what effectually amounts to inclusive community policy to solve PIL problems via the "positive" law envisioned in an expanded reading of the equal protection clause of the fourteenth amendment.

281. See generally R. DAHL, *WHO GOVERNS?* (1961); T. LOWI, *THE END OF LIBERALISM* (1969); F. LUNDBERG, *THE RICH AND THE SUPER-RICH* (1968); C. MILLS, *THE POWER ELITE* (1959).

282. Baade mentions that the application of inclusive community policy in *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966) would have offended a governmental interest closely identified with the insurance lobby. Baade, *supra* note 243, at 154.

to the utility of inclusive symbols even if they were in "positive law" garb.²⁸³

It is hard to believe that Currie would recommend that a decisionmaker violate fundamental rights or the human rights of active litigants by telling them to look for a remedy in the political arenas of a transgroup context, particularly when the customary allocations of power over PIL-type claims have, since time immemorial, been allocated in substantial measure to judicial decisionmakers, and are an intrinsic part of community expectations of a more inclusive community process. Paradoxically, Currie's emphasis on using domicile as a key connecting factor for the prescription of choice of law policy associated with the state or governmental interest myth meant that in theory, Currie would honor the perspectives of a totalitarian state, where political participation is low and perhaps circumscribed by restrictions such as "race," "class," "party affiliation," "caste," or "religion."²⁸⁴ The problem is the implied assumption that even in the PIL arena of choice of law, Currie's approach, although not Currie himself, seems to assume the moral omnipotence of the state and, by fiat, thereby excludes a broader perspective of community policy for realizing the very kinds of humane results he demanded of "the system."²⁸⁵ The objection to Currie's concept of governmental interests is more fundamental. Perhaps the most useful way to illustrate this is by a closer examination of Currie's notion of governmental interests. In this regard it is important to note that the term "interests" in this phrase, even if only by default, has been somewhat uncritically accepted. Indeed, writers who have criticized Currie have frowned on the term "governmental,"²⁸⁶ assuming, it would appear, that the term "interest" had a settled meaning. The Currie school has defended the use of the term "governmental" on the basis that the word functions somewhat as a term of art rather than a term of more specified "scientific" or generalized import. At the same time, it should be noted that the term "governmental" does function as a code word for directing a decisionmaker to the substantive prescription of a particular body politic.

Whatever inadequacies may repose in the way the Currie school

283. B. CURRIE, *supra* note 214, at 530, 536.

284. Is the interest analysis merely a complicated way of saying that the law of domicile governs? See R. CRAMTON & D. CURRIE, *CONFLICT OF LAWS* (1968).

285. "I regard most of what is good in our law and literature as the product of revolt against the system, while he (Professor Hill) regards it as a product of the system itself." B. CURRIE, *supra* note 214, at 615.

286. See, e.g., Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 388-90 (1966); Twerski, *Neumier v. Kuehner: Where Are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, 107 *passim* (1973).

uses the term "governmental," the problems attending the word "interest" are more pronounced. The way to demonstrate this is simply to ask the following: What is the empirical reference for the term "interest" in Currie's PIL theory? To ask the question is to answer it: None. It may readily be seen that the term "interest," as used by Currie, derives whatever utility it has from the legal process paradigm, and more specifically, from the model of externality implicit in this approach.²⁸⁷ One might illustrate the dubious empirical reference accorded the term "governmental interests" by briefly setting out the empirical reference the policy science school provides for delimiting the concept of basic community policy. This includes the notions of common and special interest and the notions of inclusive and exclusive interests as related to minimum or optimum order standards.

In the policy science framework, the terms "policy" or "interest" have their intellectual utility sustained by deriving their meaning from social facts, and more specifically, from the perspectives of participants in the social process. Thus an empirical reference given to the notion of "interest" centers upon (1) identifications of the relevant participants; (2) demands of component actors; and (3) the expectations, through time, that these actors entertain about how their demands for and about values can be secured. The point here is the fact that demands are specified as outcomes (a taxonomy of claims) of the social process. The empirical reference for "policy" is directly related to the demands for values that emerge from any of the complex value processes that constitute any organized group or community. This is not to say that Currie aspired to the realm of the transempirical. On the contrary, the point is that Currie's framework was too limited to allow a greater deference to the factual context of claim and ultimately, therefore, of decision.²⁸⁸ In summary, Currie's model seemed to overemphasize the

287. The specific critique of the model of externality as contraposed against the more empirical model of the policy sciences is more carefully examined in the section dealing with Professor Cavers and the jurisprudential context of his work. See *infra* text accompanying notes 326-52.

288. The most important reason for this limitation, according to Professor Baade, is that Currie sensed a basic incompatibility between governmental interest analysis and the policies implicit in full faith and credit. See Baade, *Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)*, 72 COLUM. L. REV. 329, 330 (1972). Of course, Currie made no clear-cut distinction between inclusive and exclusive community policy, nor did he distinguish between the minimum and optimum order priorities, although it may be said that some "false" conflicts simply reflect inclusively shared community expectations. Here again an appreciation of context would have enabled him to more realistically grasp the significance of the full faith and credit clause as a code-phrase for reference to inclusive as well as exclusive community policy.

control variable at the expense of the more inclusive construct of the symbols of transstate authority; in this sense it may be said that his conception of law was less than adequate and certainly partial, although important for PIL.

g. Classification of decision

Currie's work within the context of American federalism provided a sophisticated picture of both the public order and constitutive process aspects of decision in PIL as then understood. The weakness with this conception is that he did not expand these ideas more broadly.

h. Intellectual tasks

Currie did not explicitly aspire to complete all the intellectual tasks recommended here, but he went a long way toward operationalizing some of them. Perhaps his most significant contribution in this context is his methodology. Currie was perhaps the most successful of PIL scholars to attempt to clarify community policy extant in the pattern of claim and decision and to show how policy might directly inform decision.²⁸⁹ Baade attributed Currie's success to his "unusual gift for reconstructing legislative intent,"²⁹⁰ although Currie's skills were similarly influential in clarifying the policy basis of common law prescription as well. But these "governmental interests" were not specified in terms of their relative inclusivity or exclusivity, or indeed, in their relation to minimum or optimum order goals of society. Professor Hill made a similar critique, but did not carefully adumbrate the typologies analytically discernable in the clarification of basic community policies. He maintained:

The fallacy is in the assumption that this is the dominant and characteristic aspect of the process of choice of law in the assumption that when a particular foreign interest is preferred to a particular local interest, the courts of the forum have necessarily sacrificed the interests of the forum. As has been observed it is probably more likely that the result is actually a

289. Currie's idea of "policy" is narrow and somewhat constricted. Policy initially meant ignoring traditional symbols of transstate expectations. The substantive laws of competing states were not to be appraised in terms of rule formalism or internal logic but according to their conceptual basis. Currie thus sought to avoid the normative ambiguity of rule directed formulations by linking the fact pattern of a case to the policy behind the rule. This was an important innovation, but does not go far enough. The limitations on Currie's thinking here are mainly attributable to the law paradigm he used to buttress his system.

290. Baade, *supra* note 243, at 151.

vindication of the over-all governmental interests of the forum, and that the particular local interest involved in the litigation has been defeated not so much by a competing foreign interest as by competing local interests which may be specific or quite general in character.²⁹¹

i. Appraisal

Professor Currie basically saw his work as the culmination of a revolt against "the system."²⁹² The Realist inspired work of Cook, Lorenzen, and the urbane internationalist, Yntema, simply had not had significant influence on rationalizing decision in PIL as a practical matter. After World War II, it is fair to say that "the system" was well and functioning with scant regard to the Realist critique of Cook and Lorenzen.²⁹³ The problem with the Cook-Lorenzen perspective was one of inherent difficulty. It did not and perhaps could not propound a coherent social policy to inform choice; it was silent about "ethics" as a component of choice. The Realist scheme, however, allowed too much. How is a judge in a particular case to make a reasonable choice when past trends and past theory have been thoroughly discredited, when he is given no alternative constructs upon which to rely, and when he is shown that the past is an unreliable guide to decision?

The system Currie attacked was a judicial crutch known as formalism. It was a formalism that, in its worst manifestations, resulted in the frustration of public order *per se*, whether it be "provincial,"²⁹⁴ to use Mr. Justice Traynor's word, or "global."²⁹⁵ Indeed, the "system" often failed to realize exclusive minimum order policies, let alone as-

291. Hill, *Governmental Interests and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 490 (1960).

292. See *supra* note 285 and accompanying text.

293. The problem with the Cook-Lorenzen perspective was that it did not propound a social policy to inform choice nor did it attempt to devise a recommended economic policy to inform preferred choice; moreover, it was ubiquitous for its silence about ethics as a component of choice. How is a judge in a particular case to make a reasonable choice when past trends and past theory have been thoroughly discredited, when he is given no alternative constructs upon which to rely, and when he is shown that the past is, in any event, a sham exercise in mystification? Judges rarely have sophistication in moral philosophy, social and political theory, or economic science.

Chief Justice Kenison suggests that the failure of certain state courts to reject the old choice of law rules "has resulted from an unwillingness to abandon established precedent before they were sure that a better rule was available, not (from) any belief that the old rule was a good one." *Clark v. Clark*, 107 N.H. 351, 352, 222 A.2d 205, 207 (1966).

294. Traynor, *supra* note 269, at 675.

295. McDougal, *International Law and the Future*, 50 MISS. L.J. 259, 262-64 (1979).

pire to what Justice Traynor calls "optimum justice."²⁹⁶ As far back as 1969, Justice Traynor could still say that the principal hazard in PIL was "less impassioned provincialism than the lingering ills of a passive formalism."²⁹⁷ Technique, under the Formalists, had become the end.

This formalism is essentially what Currie sought to demolish in his vigorous and searingly honest style.²⁹⁸ Currie did more than simply clear the "conflicts garden" of decrepit formalism, however. He made community policy, after a fashion, the focal point of decision. According to Justice Traynor, this was an enormous conceptual breakthrough in PIL.²⁹⁹ Currie, he said, put "first things first."³⁰⁰

Justice Traynor adumbrated the importance of this innovation for PIL decision-making.³⁰¹ He appears, however, to have understated the importance of standpoint and an adequately inclusive identification for a constructive PIL paradigm. At best, Currie's implied assumptions about the moral and political foundations of the state are a naive venture into the uncharted ocean of political sociology. Moreover, the dualistic-positivistic model that he assumed to be an eternal verity was inadequate to fully adumbrate the more inclusive policy dimensions about PIL which transcend states and groups. Nowhere does Currie, Traynor, or Baade provide a sufficiently sophisticated concept of basic community policy and criteria for delimiting that which is exclusive; that which is inclusive; that which refers to minimum order; and that which includes an optimal sense of justice in more than mere casual fashion. Baade seems to have implicitly recognized this weakness for, in criticizing Dr. Jenk's reference to public policy in the United

296. Traynor, *supra* note 269, at 673. Traynor remarks that a court is "as concerned in a conflict case as in any other with optimum justice." *Id.*

297. *Id.* at 675.

298. Professor Morris noted Currie's criticism of the traditional system. Currie's series of challenging articles contain words such as "conceptualistic," 'irrational,' 'mindless,' 'ruthless,' 'wretched,' 'spurious,' 'futile,' 'arbitrary,' 'hypnotic,' 'mystical,' 'intoxicating'. . . . Morris further notes that the system "is 'an apparatus,' 'a machine,' 'a field of sophism, mystery and frustration'; 'it has not worked and cannot be made to work.'" J. MORRIS, *supra* note 168, at 511.

299. Traynor, *supra* note 269, at 668. Traynor suggests that "Professor Currie . . . succeeds in breaking away from the fuzzy interchange of policy, contacts, and interest that has characterized our awkward efforts to abandon the lexicon of superlaw." *Id.*

300. *Id.*

301. Such clarification is heartening to judges reluctant to resolve problems in terms of the old lexicon, yet reluctant also to improvise at close range to an isolated case that has come up at random in a crowded calendar of unrelated ones. It seems clear that with such experimental pitons at hand, a judge stands a far greater chance than before to reach at least a ledge from which he cannot only prepare for further exploration but secure a rope to others.

Id.

States,³⁰² he explicitly refers to the "possible utility of the McDougal-Lasswell concept of public order in the conflict of laws field" as having potentials that appear to be "much more promising."³⁰³ There appears, however, to have been no follow-through from the governmental interests camp.

Although the dualistic model tended to constrict a more inclusive perspective about PIL, it did force into view the limits of that paradigm and made its continued viability less axiomatic than before. This model also stimulated an inchoate awareness that PIL could be used to deparochialize, universalize, and structure social processes in preferred ways at all levels of community. Justice Traynor again underscored this point well.³⁰⁴

302. Baade, Book Review, 13 U. KAN. L. REV. 451, 453 (1965).

303. *Id.* at 453 n.12.

304. Meanwhile the courts could do much more than they have done toward a rapprochement of states in the optimum development of common law. The more courts strive for the optimum, the more they will liquidate local anachronisms that breed conflict. The more they realize that judicial law-making is something more than parroting the once timely wisdom of their predecessors or perpetuating their sometimes unfortunate foolishness, the more they will come to share at least the idiom of their own day and therefore common rules. If I speak confidently and not hypothetically of such a prospect, it is because of a belief that law schools are training future lawyers and judges who will be ready, willing, and able to analyze universal problems in a universal language that transcends archaic modes of thought and the patois of their own provinces.

Traynor, *supra* note 269, at 665.

If the local interest rests on a policy clearly envisaging more than local transactions or persons, and that policy is expressed in a valid statute, it is bound to prevail. If instead the policy is found in judicial precedent it is not bound to prevail. If a court hitherto uncritical finds it backward in comparison with that of the other state it may overrule its own precedent as unsuitable not only for the instant case but for strictly local ones, and in so doing again eliminate a conflict. It is as concerned in a conflict case as in any other with optimum justice. It is alerted as in no other to alternatives that may reveal shortcomings in its own law, and its enlightenment in such a case is bound to extend to purely local cases also.

Id. at 673.

Moreover, Traynor showed that forum law can and must be clarified in accord with inclusive community policy:

More than one scholar has suggested that a state may also facilitate commercial transactions having no significant public repercussions and at the same time preclude conflict, by recognizing the autonomy of parties of roughly equal bargaining power in a contract with multistate aspects. When more than one state has substantial contacts with the transaction, it seems reasonable that equal parties should be free to designate the law of one of the states as controlling the validity and effect of their contract, since reasonable certainty is of the utmost importance to the parties and needless uncertainty serves neither private nor state interests.

Courts have acted on Justice Traynor's recommendations. For example, in *Clark v. Clark*,³⁰⁵ Chief Justice Kenison concluded that New Hampshire's policy was "preferable" to the policy of Vermont, essentially because it represented a more inclusive standard.³⁰⁶ In *Clark*, Chief Justice Kenison, in following the challenges pioneered by governmental interests scholars, went even further along the pathways of rationality in embracing, from a policy science perspective, preferred public order perspectives:

We prefer to apply the better rule of law in conflicts cases just as is done in nonconflicts cases, when the choice is open to us. If the law of some other state is outmoded, an unrepealed remnant of a bygone age "a drag on the coattails of civilization" . . . we will try to see our way clear to apply our own law instead. If it is our own law that is obsolete or senseless (and it could be) we will try to apply the other state's law.³⁰⁷

Perhaps a legacy attending Currie's pioneering work (from a phenomenological perspective) is the evaluation of this challenge by one of his most eloquent colleagues, Professor Baade: "This statement," he said, "with respect seems to be at least irrelevant in a no conflict case such as the one at hand."³⁰⁸

Id. at 674 (footnote omitted).

305. 107 N.H. 351, 222 A.2d 205 (1966). In *Clark*, a husband and wife, domiciliaries of the New Hampshire forum, were in an automobile accident while passing through Vermont en route from one part of New Hampshire to another. The wife's injuries allegedly were due to her husband's negligence. Vermont's guest statute holds a host is liable to his guest for only gross and wilful negligence whereas New Hampshire's higher standard holds him liable for ordinary negligence. The forum chose to apply its own law and in so doing, abandoned the vested rights approach. *Id.* at 356, 222 A.2d at 210.

Baade comments: "who (but the insurance lobby) would disagree?" Baade, *supra* note 243, at 154.

306. Chief Justice Kenison came to this conclusion using Currie's five-step analysis. 107 N.H. 351, 354-55, 222 A.2d 205, 208-09. He stated that "Vermont's interest under its statute are in suits brought in its own courts affecting hosts, guests and insurance companies subject to its jurisdiction." *Id.* at 356, 222 A.2d at 209-10. See *supra* text accompanying notes 260-68.

307. 107 N.H. 351, 355, 222 A.2d 205, 210 (citation omitted) (quoting Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1216 (1946)).

308. Baade, *supra* note 243, at 155. Baade notes that Chief Justice Kenison purported to follow Cavers in advocating the "better rule" approach. However, Baade argues that the "better law" approach was an early effort by Cavers and that the "theory has progressed since then, and so has Cavers." *Id.* at 154. Elaborating, Baade asserts that Cavers would apply his principles of preference only in a true conflicts case, and only where no guidance could be ascertained from the forum's law. *Id.* at 151. *Clark*, however, did not present such a situation, as demonstrated by the Chief Justice's disposal of the case on the policy ground of advancing the forum's governmental interests. *Id.* at 151-52.

All of these specific criticisms, in the final analysis, do not minimize the ultimate questions about the utility of any law-paradigm; the key point is how much deference such a paradigm accords the principle of realism at the outset. Specifically, Currie was unable to provide, in a disciplined and systematic way, a realistic empirical index to sustain his concept of governmental interests. As a result, he was unable to account for the social process in a comprehensive and realistic way. Part of the problem may have reposed in a failure to provide for a more stable and disciplined focus of inquiry due to an insufficient degree of disengagement, which, in turn, may result from an inability to manipulate basic identifications. Moreover, Currie's idea of interest still suffers from some of the normative ambiguity of the "legalist." For these reasons, it is difficult to provide empirical indices to the Currie methodology. In addition, Currie failed to clarify goals in terms other than his commitment to a kind of unilateralism based on dubious moral axioms assumed to repose in the power process. The net result was that no real preferences (relative to both demands and expectations) appear to be extant in being unilateral about the basic priorities of the social process conceived in a more inclusive sense.

Professor Currie's model, whether advertantly or otherwise, provides a high degree of deference to the power process, apparently at the expense of just how the power variable might, in context, impact upon other value processes. His inattentiveness to this problem was to a very partial extent, ameliorated by the caveat he made in the so-called true conflict situations: The decisionmaker must be "restrained" and "enlightened."³⁰⁹ These concepts are themselves without special significance, unless one assumes that duly constituted judges tend to be unrestrained and unenlightened about multistate problems for reasons that perhaps even Currie would shrink from.

Finally, Currie's method utilized a limited and very traditional range of intellectual tasks. This fact, perhaps more than any single factor, accounts for the lack of a contextual approach and the clarification of policy in PIL. Lack of context essentially meant a restatement of PIL without references to transgroup customary expectations about the allocation of values across group lines.

3. Cavers in the Context of the Legal Process Framework

Professor Cavers' contributions to PIL³¹⁰ encompass two signifi-

See 107 N.H. 351, 356, 222 A.2d 205, 209. Thus, Baade concludes, Chief Justice Kenison had no need to discuss the "better rule" concept. Baade, *supra* note 243, at 154-55.

309. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 183-87 (1963).

310. Works by Professor Cavers include D. CAVERS, *THE CHOICE-OF-LAW PROCESS*

cant jurisprudential perspectives. During the course of his distinguished career, Professor Cavers emphasized the importance these perspectives held in understanding the character of PIL. The *early* Cavers can be located within the broad parameters of the American Legal Realist Movement. The *later* Cavers may be appropriately located within what might be generally called the Legal Process paradigm. This perspective of law apparently emerged in the aftermath of the Realist revolution, probably as a response to the intellectual challenge the Realist movement posed for questions concerning the nature of law and authoritative decision. Professor Cavers' work is important in contemporary PIL because it spans both the Realist tradition and the Legal Process paradigm. Indeed, it may even be considered as going beyond the boundaries of this latter perspective.

It should be emphasized at the outset that a great many of the criticisms made in connection with Professor Currie's application of the Legal Process perspective to the PIL framework are equally applicable to Professor Cavers. These include the inadequate observational standpoint, incomprehensive focus of inquiry, inattention to relevant intellectual tasks, and to some extent, the failure to postulate goals. As previously noted, the essential difference between Cavers and the governmental interests camp seems to repose in just how Cavers and Currie would handle "true conflicts" cases, as these theorists have defined them, and more specifically, how they would dispose of a "true conflicts" case if the forum were neutral. Cavers sought to provide for this kind of case by postulating "principles of preference" which he concedes are value judgments.³¹¹ For Currie and his followers, this seemed inappropriate. Yet one should carefully note what Cavers was attempting; he sought to develop a legal process paradigm for choice of law that would account for its intellectual symmetry by the use of subjective value postulates. This was a major change in the legal process paradigm and is highly significant to those who embrace the policy-science perspective, a perspective that gives considerable weight, *inter alia*, to the postulation of goals.

a. Cavers and the Realist background: context of the Principles of Preference

Professor David Cavers is a Harvard-bred legal educator who comes from a law school with a distinguished pedigree in conflicts

(1965); Cavers, *The Changing Choice of Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732 (1963); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Cavers, *The Two 'Local Law' Theories*, 63 HARV. L. REV. 822 (1950).

311. D. CAVERS, *supra* note 310, at 213.

scholarship.³¹² Cavers entered the conflicts arena with a highly influential article published in the *Harvard Law Review* in 1933.³¹³ Following closely the path of Cook and Lorenzen, Cavers delivered a stinging attack on the process of decision implicit in the vested rights-territorial sovereignty approach associated with Beale and Dicey. According to Cavers, the territorial method was essentially that of "selecting" a jurisdiction in which the criterion of choice appeared to be some notion of "fairness" or "neutrality."³¹⁴ The criterion that assured "fairness" was essentially a "blindfold" test as to whether the foreign law would be honored; various escape devices (complementaries) were available if a peek through the conceptual blinders revealed an absurd result.³¹⁵

In his critique of the vested rights approach, Cavers actually had described the structure of a formalistic mode of decision. This *was* a model of decision, inadequate to be sure, yet Cavers was able to distill the crucial decision procedures that had animated it, thereby exposing its basic weakness. This was an important intellectual breakthrough for the process of decision that underlay the vested rights approach was now itself the focus of attention and meaningful criticism.

Cavers did not stop there. He developed a methodology for the solution of choice of law problems; a methodology that effectually provided the framework or taxonomy of a model of decision of more general jurisprudential interest. The model appears to have emerged almost inexorably from the legacy of the Realists. The most direct Realist influence on Cavers' model for the choice of law process appears to be attributable to Lorenzen. Lorenzen's suggested solution to the choice of law problem was couched in the form of a rhetorical question cited twice with apparent approval by Cavers. The question was: "What are the demands of justice in a particular situation; what is the controlling policy?"³¹⁶ Cavers argued that an adherence to *his* taxonomy of decision would point the way to a "just decision in the principal case."³¹⁷ Misunderstandings emerged concerning exactly what Cavers

312. The Harvard faculty produced such figures as Story, Beale, Griswold, and more recently, von Mehren and Trautman, not to mention Cavers himself.

313. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

314. *Id.* at 180. The essence of this test is the choice of a jurisdiction's substantive law, without exercising any scrutiny of that law, save for purposes of application. *Id.*

315. *Id.* at 182-87. These complementarities include *renvoi*, public policy considerations, the intention of the parties as to which state's law should apply, and characterization of a foreign jurisdiction's law as procedural as opposed to substantive in content. Cavers notes that it is a "familiar doctrine that the forum's rules of procedure will always be employed." *Id.* at 185. See also Baade, *supra* note 243, at 142-43.

316. Cavers, *supra* note 313, at 187.

317. *Id.* at 193. Cavers envisioned the following decisional map:

This effort to portray an approach to problems of conflicting laws which

meant here; whether, for example, this implied "cadi" justice or the creative potential of a "free law" syndrome. The implication in Cavers' argument was that PIL, like all other legal decision, was essentially concerned with social, political, economic, and ethical choice; authoritative decision could be conditioned by a common sense estimation of how decision would impact on the social process. Then, perhaps, choice could be made according to what was or was not deemed desirable in context.

Many years later, Cavers expressed some disquiet about the "free law" implications of the 1933 article.³¹⁸ These attitudes, it appears, served as a prelude for what was to come. In 1965 Cavers published his now classic Cooley lectures.³¹⁹ In this book Cavers responded to the challenge posed by the "free law" implications that many had attributed to the 1933 article. To the extent that there could be attributed to Cavers a "free law" approach, Cavers sought to displace it. He displaced it by recourse to "principles of preference."³²⁰ Cavers' book, however, is even more interesting from the standpoint of developments in American legal culture in the aftermath of the Realist movement. In

would free the courts from the blindfold of a theory which has compelled them to grope for solutions to problems for which perspicacity is peculiarly essential has been argumentative and discursive. At the risk of distorting an idea not susceptible of blackletter statement, I shall hazard this summary:

When a court is faced with a question whether to reject, as inapplicable, the law of the forum and to admit in evidence, as determinative of an issue in a case before it, a rule of law of a foreign jurisdiction, it should

- (1) scrutinize the event or transaction giving rise to the issue before it;
- (2) compare carefully the proffered rule of law and *the result which its application might work in the case at bar with the rule of the forum* (or other competing jurisdiction) and its effect therein;
- (3) *appraise these results in the light of those facts in the event or transaction which, from the standpoint of justice between the litigating individuals or of those broader considerations of social policy which conflicting laws may evoke*, link that event or transaction to one law or the other; recognizing
 - a) in the use of precedent, that those cases which are distinguishable only in the patterns of domestic laws they present, may for that very reason *suggest materially different considerations than the case at bar*, and
 - b) in the evaluation of contacts, that the contact achieves significance in proportion to the significance of the action or circumstance constituting it when it related to the controversy and the solutions thereto which the competing laws propound.

Id. at 192-93 (emphasis added).

318. D. CAVERS, *supra* note 310, at 8-12.

319. *Id.* This book is based on the Thomas M. Cooley lectures delivered at the University of Michigan, Jan. 21, 22, 24, 1964, under the title "Policy, Justice, and Principle in the Choice-of-Law Process."

320. *Id.*

order to fully grasp Cavers' retreat from the "free law" implications of his earlier work; to understand his own evolving concept of law as a process; and to understand his postulated principles of preference in sustaining such a concept of law, one must trace his intellectual passage back to the kind of crisis for legal ideology that the Realists posed. This is a crisis that, in some measure, was provoked by Cavers himself (if his 1933 article is to be taken at face value).

b. The aftermath of the Realist challenge

Cavers, like many American law teachers, was immensely influenced by the Realist giants of his day. Indeed, he would have needed an uncommon degree of intellectual independence to have remained immune to their infectious iconoclasm. But Cavers, working in the PIL framework, seems to have taken the Realist challenge to the extreme. The "free law" implications of his decision model literally demanded something more in the way of a rational decision process. His taxonomy of the formalistic model of decision and his own partial model, which he seems to have recommended as a mere academic exercise, posed a decision challenge to the Realists with heightened specificity. Professor Cavers' 1933 model seemed to express an optimism, characteristic of much Realist thinking, that science, social or otherwise, and technology, under the control of intelligent decisionmakers, would provide a more just social order. To make the 1933 model work, Cavers, or anyone using his model, would have to give operational significance to the Realist claims about social policy, instrumentalism, and pragmatism; indeed, the very idea of a functional jurisprudence. Cavers had hinted at a solution in the 1933 article by recommending procedures for a more elaborate decisional process.

How did the architects of American legal culture respond to the challenge of the Realists and, to some extent, the challenge of Cavers himself? Three broad currents appear to have emerged in the aftermath of the rule and fact skepticism of the Realists.

The most direct of these responses was the law, science, and policy jurisprudence of McDougal and Lasswell. If, as the Realists had demonstrated, rules of law were really a mask for the nonspecification of the real reasons for decision, then it was thought that a new paradigm was necessary; nothing less would suffice. Professors McDougal and Lasswell planted the seeds of this new paradigm in their 1942 article in the *Yale Law Journal*.³²¹ The Policy Science framework was

321. McDougal & Lasswell, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203 (1943).

built on the foundations of the Realist movement.³²² It appeared to accept, perhaps naïvely, theoretical aspects of the Realist challenge; it accepted, perhaps uncritically, the assumption that the revolutionary rhetoric of the Realists be taken literally, together with their commitment of some vaguely conceived sense of human decency. In contradiction to these assumptions as directed at legal education, the law teaching fraternity was, and has remained, essentially conservative though, in the upper echelon schools, seemingly opportunistic.³²³ Thus, the

322. It is possible that the New Deal provided a great deal of justification for the belief. Many Realists became distinguished administrators in the New Deal Administration of President Roosevelt. See generally J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976). The interesting historical question is what would have happened to the New Deal and its supporters in the American legal culture if World War II had not come about.

323. This statement needs to be qualified. It is a conclusion borne, in part, of a personal experience of the writer. This writer's first experience with the Realist's style occurred when he took a course in basic business associations law under Dean Elvin R. Latty of the Duke Law School. The writer found the experience a remarkable one, coming, as he did, from a very traditional Oxford legal education. Dean Latty's style included tearing opinions apart, illustrating unarticulated assumptions and values, essentially seeming to challenge the institutional integrity of judges, and by implication, the entire legal system. All of this seemed to be a thoroughly radical enterprise. And yet Dean Latty's views on lawyer's roles tended to be ultra-traditional, even by American standards. Perhaps this experience is to some extent supported by Professor Gilmore's comparison of Yale and Harvard law schools. According to the sardonic Gilmore, "If you go to one of them (i.e. Yale or Harvard), you will in all probability come out a conservative anarchist. If you go to the other, you will come out an anarchic conservative. The difference . . . is more of style than substance." See Gilmore, *The Truth About Harvard and Yale*, 10 YALE L. REP. 9 (Winter 1963).

An even more interesting issue, in this context, is directed at the character of the law teaching fraternity itself. It has been suggested that the traditional educational exposure of the law student was pervaded by an assumption of moral neutralism; that the traditional curriculum did little more than instill a *laissez-faire* moral tone to legal education. See Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 393-94 (1971). Why are American law teachers in prestigious law schools so essentially conservative as a group, and yet still capable of embracing the distinctive realist style as a principle mode of dispensing legal education? And why, paradoxically, is the end product of all this probing and challenging so thoroughly wedded to the status quo? Conservatism is ubiquitous among law teachers and students. Why?

There are many reasons for this, but it is probable that theoretical perspectives deeply embedded in the legal culture contribute to sustain this strain of conservatism. Interestingly, the middle and lower echelon law schools have and continue to remain somewhat immune to the Realist influence—and have remained staidly conservative too. See W. WEYRAUCH, *HIERARCHIE DER AUSBILDUNGSTÄTTEN, RECHTSSTUDIUM UND RECHT IN DEN VEREINIGTEN STAATEN*, (1976). According to Professor Weyrauch, the legacy of Blackstone has never been overcome in lower echelon law schools. The assumptions that underlie the Blackstonian style embody such ideas as a closed legal system and the assumption that correct solutions can always be found within the system by the process of deductive reasoning. This style has a mechanical quality. It embodies the classification of

rhetoric of the Realists became commonplace in top-class law schools, but the radical implications of this perspective were seemingly finessed, with the important exception of developments in the policy sciences at the Yale Law School under McDougal and Lasswell.

There remained a latent conservatism which could seemingly follow two credible pathways; it could either revert to the legal ideology associated with formalistic positivism or it could carve out a more conservative post-Realist law paradigm. The legal perspective associated with formalistic positivism would continue to focus on such traditional jurisprudential questions as: What is a valid law and how does one distill the criterion of validity of a binding legal rule? Many American scholars were influenced by this approach, which appears to have attained a new degree of respectability after the publication of Professor H.L.A. Hart's book, *The Concept of Law*.³²⁴ But the pathway that came to predominate in elite law school circles was the framework that was closely identified with Harvard legal culture, or more accurately identified with such eminent scholars as Hart, Sacks, Wechsler, Bickel, Wellington, and others. The framework these men have developed and worked from has not been appropriately identified although it has been variously styled as the Legal Process school because of the title of the tentatively formulated materials of Hart and Sacks.³²⁵ An exploration of the conceptual basis of this framework will enable one to better appreciate Professor Cavers' contribution to the development of the choice of law process.

c. The conceptual basis of the legal process paradigm

Theorists within this framework asked a slightly different question from that of the formalistic school. They did not ask what is a valid law or what is a binding rule. They did not believe there was a "correct" doctrine to every problem. Indeed, they had absorbed at least

abstract legal categories that can be easily handled by computers and which lends itself to mass application on a routinized basis.

Elite institutions came under the influence of the legal skepticism of Holmes—an orientation given a decisive thrust by the Realists in the thirties and early forties. This perspective appears to have been preempted by a predominant variety of the legal process paradigm.

324. H. HART, *THE CONCEPT OF LAW* (1961).

325. One reason may be that the two major ideologies that this writer believes are relevant to American legal culture, those of McDougal and Lasswell's "Law, Science and Policy School" and the Hart and Sachs' "Legal Process School," have been espoused only in tentative editions and are being revised continuously. How widely accessible they are within the United States—let alone outside—is difficult to say.

some of the remaining relativism of the Realists.³²⁶ Essentially they asked what, in context, is a judicial question; and correlatively, what is a political question? The model seems to have anticipated a kind of theory of games³²⁷ in which all the power-centered actors were charged with assuming certain role-typologies: legislative, executive, administrative, judicial, etc. The principal thrust of this school became the search for the "correct" role for the judiciary.³²⁸ The crux of legal disputation, what would importantly define role-in-context, was how to respond to what Llewellyn infelicitously called the "law-stuff."³²⁹

326. A further condition that, it has to be admitted, influenced the Realists and inhibited a larger following in the Policy Science framework were the confusions the Realists developed about scientific relativism and its uncritical transposition to human affairs. They failed to grasp an essential truth that even Austin was aware of: that there is nothing relative about the finality of decision in social process; that in decision arenas there are practical limits to the luxuries of philosophic relativism. In addition, the Blackstonian style of legal culture simplified the decision process and presented the law in an easily communicable form. This may also account for the resilience of Blackstone-style legal culture in rank and file circles.

327. Complex mathematical models constructed in game theory have not been detailed enough to describe the intricate structure of the legal decision. Perhaps the most serious objection to game theory model building from a policy science point of view is that the limited range of indices for projecting from the past into the future are invariably weighted in favor of "tradition" and hence the *status quo*. If this kind of moral authority were accorded, e.g., the doctrine of *stare decisis* (an almost causally determined morality), claims for change would rarely be tolerated. The configurative approach, with its contemplative and manipulative features and with its focus upon equilibrium and developmental analysis, represents a comprehensive, realistic and more flexible model of decision about law. For a discussion of game theory, see generally A. RAPAPORT, *FIGHTS, GAMES AND DEBATES* (1960); M. SHUBIK, *GAME THEORY AND RELATED APPROACHES TO SOCIAL BEHAVIOR: SELECTIONS* (1964); J. VON NEUMANN & O. MORGENTHAU, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1953).

328. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); A. BICKEL, *THE MORALITY OF CONSENT* (1975); A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); H. HART & A. SACKS, *THE LEGAL PROCESS, BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958). Cf. M. SHAPIRO, *FREEDOM OF SPEECH, THE SUPREME COURT AND JUDICIAL REVIEW* (1966); M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* (1964); Wechsler, *Toward Neutral Principles of Constitutional Law*, in *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* (1961); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973). This general perspective has been subject to some interesting criticism. See Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

329. See, e.g., K. LLEWELLYN, *THE BRAMBLE BUSH* (1930); Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930). By "law stuff" I mean generally the use of precedent, interpretation of symbols, use of models and analogies, derivative logic, "informal logic," i.e. the mixture of rhetoric and dialectic, etc.

The Legal Process school developed an inward and timid process-oriented focus to sustain itself as a credible perspective in the aftermath of the Realists.³³⁰ This perspective emphasized, in large measure, the traditional "methods" of legal argument. It emphasized traditional methods of judicial conflict management sustained by an emphasis on craft skills styled as neutral principles.³³¹ It sought to exploit the "traditional" insularity of "law" from being accountable for dynamics of social policy and the value outcomes that necessarily flow from deci-

330. See *supra* note 328.

331. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). See also L. FULLER, *THE MORALITY OF LAW* (1964). Fuller's conception of an internal morality in the structure of law has some affinity with the concept of neutral principles and the relationship of the craft-skills to the structure of these principles. According to Fuller the "inner morality of law is condemned to remain largely a morality of aspiration and not duty. Its appeal must be to a sense of pride of craftsmanship." *Id.* at 43. See H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958).

The key to the legal process school is the emphasis on the "principle of institutional settlement." H. HART & A. SACKS, *supra*, at 4. This principle defines role. It best defines role within the context of the priorities of the minimum order dimension. Compare the following:

Implicit in every such system of procedures is the central idea of law—an idea which can be described as *the principle of institutional settlement*. The principle builds upon the basic and inescapable facts of social living which have been stated: namely, the fact that human societies are made up of human beings striving to satisfy their respective wants under conditions of interdependence, and the fact that this common enterprise inevitably generates questions of common concern which have to be settled, one way or another, if the enterprise is to maintain itself and to continue to serve the purposes which it exists to serve. To leave decision of these questions to the play of raw force would defeat these purposes. The alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision. The principle of institutional settlement expresses the judgement that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed.

Many of the mysteries about the nature of law and of legal concepts disappear in the light of a clear understanding of the principle of the institutional settlement and of the reasons which entitle it to acceptance. Thus, countless pages of paper and gallons of printer's ink have been expended in the debate about whether law is something which "is," like the data of the physical sciences, or something which involves elements of what "ought" to be, resting upon moral or other prudential considerations. The external facts of physical existence and human behavior and attitudes with which the law must deal are, of course, matters of what "is," or of what "will be." But apart from these limiting conditions which the law must recognize as fixed by the nature of its subject matter, the only important elements of "is" in the law are consequences simply of the principle of institutional settlement.

Id.

sion.³³² Community expectations about role and professional image were, therefore, what "lawyers" thought they were. This was established by examining the past to define the present and stabilize the future. The principle of institutional settlement and the traditional indices that sustain this concept served to define the judicial role-in-context. In practice, this has roughly appeared to mean that procedural values, conceived as the stuff of argument, became the end rather than the means to an end.³³³ Procedural values are seen to be distinctively legal values; the dynamics of the legal process are conceived in the nexus between "legal values" and "legal institutions." Thus, the adherents of this school tend to emphasize principles of procedure and to deemphasize principles of content. A proper balance between the two appears to be avoided assiduously by the more conservative adherents of this frame.³³⁴

The Legal Process school distinguished itself from the pre-New Deal Court on the basis that the Court was activist in nature and that the naturalistic vision, that had bemused the operative majority in that Court, was not necessarily good or bad. What was to be deplored was that it should have had the temerity to have entertained such a vision at all. The policy dimension in this perspective was, therefore, deemed to be meta-legal. If it was "political," therefore, it was to be allocated to the "political" branches of the power process: to the executive-type or to the legislative-type.³³⁵

What, then, is the conceptual basis of this school? The foundations for this perspective were, of course, directly attributable to the

332. See L. FULLER, *supra* note 331, at 96-109. Fuller uses the famous example from the early sixteenth century: Dr. Bonham's Case, 77 Eng. Rep. 638, 8 Co. Rep. 107a (1610). Here Fuller argues that Coke's opinion relies heavily upon "procedures" and "institutional practices" as instruments of legal insularity. L. FULLER, *supra*, at 100. Fuller criticizes the Court's opinion in *Robinson v. California*, 370 U.S. 660 (1962) for striking down a state statute as violative of the eighth amendment, thereby breaching this insularity. L. FULLER, *supra*, at 100. Cf. A. BICKEL, *THE MORALITY OF CONSENT* 120-21 (1975); M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT, NEW APPROACHES TO POLITICAL JURISPRUDENCE* (1964).

The Court's failure to grapple with the complex philosophical and theoretical issues that lie behind the notion of constitutional democracy led it away from the delicate and tentative adjustments that our peculiar form of democracy requires and into the formulation of appealing slogans.

Id. at 250-52.

333. Procedural law in a technical sense has been called adjective law, i.e., it exists for the sake of something else—for the sake of substantive law. See C. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING* (1897).

334. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

335. Cf. Deutsch, *supra* note 328.

ubiquitous Oliver Wendell Holmes, Jr.—a Harvard alumnus. A most useful illustration of Holmes' thinking on this point was provided in *Lochner v. New York*.³³⁶ In *Lochner*, Holmes recorded a powerful dissent in response to a decision from the majority of the Court declaring that the New York State legislature did not have the legal power to regulate the wages and working hours of New York bakers because that statute unconstitutionally interfered with the freedom of contract of the affected parties.³³⁷ Holmes castigated the majority, not for the right or wrong of its perspective; rather he criticised them for having a perspective incompatible with their role as Supreme Court Justices. Holmes wrote:

I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez-faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word

336. 198 U.S. 45 (1905).

337. *Id.* at 74.

liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.³³⁸

Holmes continuously refined these ideas which he felt embodied nothing less than the theory of the Constitution. Appropriate roles in the process of power allocations were a major component of legitimacy and effectually a criterion by which the authority myth was established and maintained.

Holmes implicitly recognized two essentially recurring problems attending the disposition of power in society. First, as Lerner put it, life inevitably involves "a clash of power, and law was in the main, the rationalization of the interests of the dominant group."³³⁹ Second, that pure democracy, the consent of all, was the archetype of anarchy, a nonlaw state. The solution that Holmes saw in the Constitution seemed to amount to the following: While the consent of all cannot be obtained in a heterogeneous society, there can, at least, be consent about the process. That is, while various individuals and groups which comprise the community may differ upon substantive policies, they nevertheless "agree" or "consent" to abide by those decisions because of the "legitimacy" of the decision-making process. Dissenting in the context of a first amendment claim, Holmes wrote:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.³⁴⁰

This model incorporated an old philosophic fallacy which Holmes did seek to avoid. This was the effort to objectify "law" by sustaining a

338. *Id.* at 74-76.

339. M. LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* 44-111 (1943).

340. *Abraham v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For the pluralistic version of this thesis, see R. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* 3-4 (1967). For a reply to the invisible hand assumptions implied in this model, see T. LOWI, *THE END OF LIBERALISM* (1969).

"fictitious" cleavage between the "external" and "internal"—a form of dualism that has existed frequently in various forms in Western political culture, the most simple formulation of which is the familiar dualism between the individual and society.³⁴¹

Holmes appears to have unwittingly accepted the neo-Kantian idea that law was somehow connected to a (relativistic) version of universal rationality.³⁴² He accepted this, however, in a version that sought to minimize its metaphysical implications in law. Holmes effectually set this up as a model of community expectations about the legal process extrinsic to the human element. A good illustration of this point was reflected in his essay on *The Theory of Legal Interpretation*,³⁴³ in which Holmes came close to a model of externality and objectivity in exploring the nature of law.³⁴⁴ It seems Holmes tried to invent an ideal-type of "speaker of English" for the interpretation of language embodied in legal instruments. According to Holmes, the "law-job" associated with interpretation was not "to discover the par-

341. See H. LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* (1930).

342. Law is "external." Morality is "internal." Law is "objective." Morality is "subjective." According to Kant:

When it is said that a creditor has the right to exact payment from his debtor, it does not mean that he may put it to the debtor's conscience that the latter ought to pay. It means that in such a case payment may be compelled consistently with the freedom of everyone and hence consistently with the debtor's own freedom, according to a universal law.

R. POUND, *LAW AND MORALS* 104 (1969).

343. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899).

344. The following quotation illustrates yet another application of Holmes' objective theory of law:

Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned or explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, and nothing else.

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). This is essentially why common law lawyers have rejected the continental "wills" theory of contract (on the basis of its' being subjective) in favor of their own concept of an objective law of contract—sustained essentially by the doctrine of consideration. See R. LEE, *AN INTRODUCTION TO ROMAN-DUTCH LAW* 431-36 (5th ed. 1953).

Recently, Professor Gilmore attempted to trace the decline and fall of the doctrine of consideration on this side of the Atlantic. G. GILMORE, *THE DEATH OF CONTRACT* (1974). It may be that the title of this book overstates the central thesis which points more to the death of the objective theory of contract because of the alleged demise of the doctrine of consideration and the bargain theory that it presupposes. For critique, see Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161 (1975). A more contemporary, and avowedly jurisprudential restatement of the objective theory of law is to be found in Christie, *Objectivity in the Law*, 78 YALE L.J. 1311 (1969).

ticular intent of the individual to get into his mind and bend what he said to what he wanted"; rather, the critical task was to ask "what those words would mean in the mouth of a normal speaker of English."³⁴⁵ He justified the theory on the basis that the normal speaker of English had a spatial and temporal relation that was "external to the writer," and "a reference to him as the criterion is simply another instance of the externality of the law."³⁴⁶ This idea, it is suggested, forms the conceptual basis of the legal process school. It suggests, paradoxically,³⁴⁷ that there is an objectively verifiable, and therefore "correct" model of the judicial role, and that this role can be distilled from the past so as to prescribe the future. This model assumes, in a broader vein, that there exists objective criteria that defines and distinguishes the "legal" from the "nonlegal," the "judicial" from the "political" question; and that all of these outcomes are the product of an extrinsic-objective character. A key assumption in this frame is that all outcomes of decision are the products of beings who have purged themselves of all subjectivities, i.e., that decisionmakers are informed by purely extrinsic objective criteria in assuming the decisional role.

345. See Holmes, *supra* note 343, at 417.

346. *Id.* at 418.

347. I say paradoxically because Holmes was a skepticist. The roots of Holmes' skepticism are probably traceable to the Greek Sophists. Protagoras, a leading sophist, was noted for the following doctrine: "Man is the measure of all things, of things that are that they are, and of things that are not that they are not." PLATO, *THEAETETUS*, cited in B. RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 77 (1945).

Russell explains, "This is interpreted as meaning that *each* man is the measure of all things, and that, when men differ, there is no objective truth in virtue of which one is right and the other wrong. The doctrine is essentially skeptical and is presumably based on the 'deceitfulness' of the senses." *Id.* There are conservative implications in such a philosophical stance. According to Russell:

The disbelief in objective truth makes the majority, for practical purposes, the arbiters as to what to believe. Hence Protagoras was led to a defence of law and convention and traditional morality. While, as we saw, he did not know whether gods existed, he was sure they ought to be worshipped. This point of view is obviously the right one for a man whose theoretical skepticism is thoroughgoing and logical.

Id. According to Russell the Sophists "taught the art of arguing, and as much knowledge as would help in this art. Broadly speaking, they were prepared, like modern lawyers, to show how to argue for or against any opinion, and they were not concerned to advocate conclusions of their own." *Id.* at 78.

The pursuit of truth, when it is wholehearted must ignore moral considerations; we cannot know in advance that the truth will turn out to be what is thought edifying in a given society. The Sophists were prepared to follow an argument wherever it might lead them. Often it led them to skepticism."

Id. Interestingly, Holmes' skepticism and his search for an objective theory of law may be inconsistent jurisprudential perspectives; or they may reflect a dialectical process from which higher jurisprudential insights might emerge.

In this perspective, the focus on process was "judicial" in a literal and very constricted sense. Process meant definition and redefinition of role. Major goals or purposes in this model were centered on role-maintenance. The technique was defined as that of judicial self-restraint. The impacts of self-restraint were to be judged more in terms of what such outcomes did for preserving the "judicialness" of a role, rather than with regard to impacts on the structured ordering of the substantive practices in the social process. One might say that law (the judicial role) became an end itself rather than a means to an end. In this respect the position of the Legal Process perspective shares some affinity with the formalistic school. Judge Fitzmaurice, writing in dissent, crystallized this point well when he wrote: "Inferences based on the desirability or, as the case may be, the undesirability, of certain results or consequences, do not, . . . form a satisfactory foundation for legal conclusions. . . ."³⁴⁸ The teleological question, "What is law for?," was conceded in classically "bad man" terms. The bad man wants to know the outer limits of licit behavior; he wants to know when public force will be used—the minimum order dimension. The bad man needs objective law. The school thus implicitly accepted, at least, some of the implications of a Hobbes-type universe and perhaps even a laissez-faire approach to the power process. These assumptions seem to be more intensively identified with those who emphasize as critical the role-structure of "restraint," rather than that of "activism."

The legal process then, in practical terms, is the one that epitomizes the goal of fairness as contained in the idea of procedural due process. The focus is on conflict management and conflict resolution. Law is seen as an "umpire" between competing wills, and the outcomes of judicial decision are system-maintaining so long as every claimant has been accorded his "due process." The definition of law is the definition of legitimacy conceived in terms of minimum order standards. If this conclusion is sound, then it seems that the Legal Process theory, on balance, takes a kind of laissez-faire approach to the disposition of power in society. Important consequences for the relationship between law and justice flow from this premise. For example, any symbol can serve as an operational index of legitimacy if the propaganda managers are competent and if effectual elites are sufficiently deft in the manipulation of the symbols of moral rectitude, while in fact the substantive value processes might be unfairly managed by them or their surrogates. This frame appears to radically simplify the actual working of the

348. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 224.

power process.³⁴⁹

There are two broad responses to Holmes' formulations. The first response comes from the psychoanalytic insight into the subjective-objective dichotomy, a conceptual Gordian Knot that Professor Lasswell slit over forty years ago when he substituted for this "fictitious cleavage," a continuum of reference points that reflect the subjectivities of individual and collective selves.³⁵⁰ The critical decisional question is, therefore, not the establishment of an ideal-type of legal form (or form of English speaker) that is external to the relevant participants, but rather the recognition of how shared perspectives (subjectivities) stabilize and change value allocations in society and whether these outcomes are good or bad according to the stated goals or major purposes of the legal and political culture. And the function of a decisionmaker in law is essentially, as McDougal, Lasswell and Miller pointed out,³⁵¹ conditioned by a much more comprehensive and realistic range of decisional indices and goals from which that decisionmaker cannot, in any event, escape. This does not deny the existence of some form of externality; it emphasizes that the decisionmaker *does not have to strive for normal externality*; it is a fact of life. He has such externality thrust upon him by the fact that he cannot directly observe the subjectivities of the parties.³⁵²

349. This simplistic appreciation of the power process within the United States is demonstrated by Judge Skelly Wright in Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 787-89 (1971). Theorists in the legal process school have addressed themselves to the problem of the moral foundations of neutralism. The solution to the tradition of moral neutralism in law is apparently rooted in the moral foundations of Holmes' philosophical skepticism. Fuller provides perhaps the clearest expression of this "solution." He saw in the Socratic method in legal teaching a "return to the Socratic conception that men find virtue best, not through faith or exhortation, but through understanding." Fuller, *What Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL ED. 189, 202-03 (1948). To avoid the question of choosing between substantive values, Fuller disclosed the secret formula: "The secret is, in other words, to concentrate on the process, and not to try to determine in advance what results should emerge from the process in the form of specific solutions." *Id.* at 204. Expressing a naturalistic faith in the "process" he added, "[i]f we do things the right way, we are likely to do the right thing." *Id.* Analytical vigor, it appears, could illumine the pathway to ethical and moral "higher purposes." This is, at least, one of the premises of adherents of this perspective. The Fuller position seems more ambiguous because it is so emphatic about the *process* of argument and the traditions and institutional practices that sustain it. These traditions and institutional practices seem to represent Fuller's "internal morality" of law.

350. H. LASSWELL, *supra* note 341 (cleavage separates the study of the "individual" from the study of "society").

351. M. MCDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967).

352. See generally *id.*

The critical issue is this: observing the subjectivities of component actors is an exercise in realism if decisions are to be made about "real" demands (perspectives). Some of these components of behavior are easily observable and we tend to call these facts "objective." Some components of behavior are less observable and we call these facts "subjective." Because we cannot readily or easily observe and record less observable behaviors in the process of social interaction, the objective model of law implicit in Holmes' formulation would tend to discard the less observable as an insufficiently "hard" predicate upon which to sustain the concept of law. The terms "objective" and "subjective" have presented a rigid dichotomy that seems to have had a life of its own in law, and in addition, appears to have inhibited the development of a more innovative methodology in the process of decision. From the policy science standpoint, such a distinction would not be thought methodologically sound. A policy scientist would place behavioral interaction on a continuum which moves from the more to the less observable. To the extent that there are techniques to discover the less observable facts of human behavior, there would appear to be no good reason to exclude such techniques and facts from shaping the legal myth to comport more realistically with the human subjectivities found in ever evolving community expectations about control, authority and the allocation of values. The contents of consciousness are empirical. The critical question should therefore focus on the indices one uses to distill the content of consciousness in context. It is these indices that "ought" to shape the decisional role. In short, the model of externality suffers from major defects reflected in the critiques leveled at Professor Currie's governmental interests analysis. Indeed, among its drawbacks are its lack of a principle of realism; its lack of a principle of contextuality; and its inability to supply meaningful empirical indices that "ought" to frame the decision role as a challenge to the traditional and emergent demands of men and women in society. The focus of inquiry implicit in Holmes' demand for objectivity appears to *require* that the decisionmaker purge himself of the crucial facts of social interaction animating the claim in the first place—the subjectivities of the claimants themselves.

By making law "objective," the Legal Process school sought to sustain a very old tradition. It sought to refine the concept of law without power; a concept which held that the legal regime could sustain and regenerate a continuing myth independently of the power process. It attempted this in a refined and quite sophisticated manner. This school never quite understood, however, the profound implications of Cardozo's aphoristic comment on the Realists that "law never is, but is

always about to be.”³⁵³ For this dynamic quality is the essence of making policy. Former Secretary of State, Henry Kissinger stated this remarkably well when he emphasized the creative element in policy-making. He said: “The essence of policy is its contingency; its success depends on the correctness of an estimate which is in part conjectural.”³⁵⁴

The essential problem with this school, especially in its more restrained orientations, is that it seems to assume, in large measure, that structure should condition role. This assumption is implied in the objective characterization of the nature of law. The critical question, however, is not the externality factor as such—this is a biological datum; rather, it is the content and character of the indices that sufficiently frame the predispositions of a decisionmaker, allowing him to make a sensible decision that should, so far as possible, fulfill such subjective demands of all claimants as are consistent with the aggregate pattern of shared subjectivities of the body politic. It is the character of individuated and collective demands that, in context, should inform the decisional role and not the reverse. This reversal is the essential difference in the starting points of the policy science and legal process schools.

In conclusion, the critical difference between the policy science and legal process schools lies in their diverse approaches to the challenge spawned by the Realists. For the policy science school, the challenge lay in developing a comprehensive and realistic model of decision that could be meaningfully related to the social process and understood in terms of the priorities of that process. To the legal process school, there was the self-conscious cultivation of the legal image whose function was not to discover whether the body politic was on the wrong track and headed for a collision, but rather to make the “train” move faster. The legal process school sought to cultivate a kind of juridical-bureaucratic personality-type, whereas the policy science school sought to make the decisionmaker mature and technically capable of making the creative choices that the decision process demands. Kissinger stated this idea rather well:

Profound policy thrives on perpetual creation, on a constant redefinition of goals. Good administration thrives on routine, the definition of relationships which can survive mediocrity. Policy involves an adjustment of risks; administration an avoidance of deviation. Policy justifies itself by the relationship

353. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 126 (1921). Cardozo himself made the comment rather perjoratively.

354. H. KISSINGER, *A WORLD RESTORED* 326 (1964).

of its measures and its sense of proportion; administration by the rationality of each action in terms of a given goal. The attempt to conduct policy bureaucratically leads to a quest for calculability which tends to become a prisoner of events. The effort to administer politically leads to total irresponsibility, because bureaucracies are designed to execute, not to conceive.³⁵⁵

While the nature of law might have compelled a greater respect for the problem-oriented approach among the legal process theorists, they were and remain noncontextual, although significantly, they were not entirely tradition-bound in terms of their receptiveness to advances in science and technology. They have never, however, provided a model of decision sufficiently flexible to scientifically integrate the findings of science into the arenas of decision, except in the more simple context. This brief summary then, is a bare conceptual outline of the legal process paradigm that appears to have informed both Professors Currie and Cavers in PIL.

d. The Choice of Law Process

As we have indicated, the foregoing approach did not assume an exclusive primary on the frontiers of American legal ideology. A school developed at Yale sought to respond more directly to the challenge the Realists had formulated regarding the nature of decision. Indeed, it was Cavers' 1933 article that had sought to set out some sort of a taxonomy of decision for the PIL context. It was the 1933 article that enabled the next generation of conflicts scholars to appreciate the limits of fairness and neutrality as criteria guiding PIL decision; the concern for results could not be avoided.

In 1965, Professor Cavers published his book *The Choice of Law Process*.³⁵⁶ The title should have betrayed its ideological roots. It was framed in what seemed essentially the structures of the legal process paradigm. The early Cavers had left us with the "free law" legacy; a challenge to decision, policy-making and application. The new Cavers acceded to the major assumptions of Currie and the legal process school up to a point. Currie would go no further than being "restrained and enlightened" about creative choice; Cavers emerged with criteria for a "principled" decision in his principles of preference. Essentially, these principles are postulated as Caver's version of preferred goals. He offered five for transgroup tort claims, two for transgroup contracts

355. *Id.* at 326-27.

356. D. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965).

claims and one for conveyancing needs. Cavers' five principles in tort law are, briefly, as follows:

(1) If the *lex loci delicti* sets a higher premium on conduct or financial compensation than the *lex loci domicilii*, or the place where the defendant "acted" delictually, select the *lex loci delicti* as providing the rule of decision.

(2) If the *lex loci actus*, or the place where the injury was caused, prescribes a lower standard for the conduct of the defendant or the measure of financial compensation due than the *lex loci domicilii* of the plaintiff, select the *lex loci actus* as the law that supplies the rule of decision.

(2a) If the law of *lex loci delicti* sets a lower standard of compensation (protection) than the *lex loci domicilii* of either defendant or plaintiff, select the *lex loci domicilii* of either of the concerned parties that carries the lowest financial compensation.

(3) Where a state legislates explicitly for the multi-state tort context and the other concerned state does not, defer to the "laws" of the former state where the nature of the injury meets a kind of foreseeability test.

(4) The fourth point invokes the Savigny "seat of the relationship" test, and recommends that, where the state that harbors the seat of the relationship (its center of gravity) has a standard of conduct or of financial compensation which is higher than that of the place of the injury, select the former law.

(5) If the law of the center of gravity of the relationship imposes lower standards than the *lex loci delicti*, it should also prevail.³⁵⁷

For contract law, Cavers recommended: Where state A prescribes standards for incompetence, heedlessness, ignorance, and inequality, its law prevails when (a) that is the person's *lex loci domicilii*; or (b) that state is the center of gravity of the relationship; or (c) the facts make reference to other prescriptions as fortuitous or manipulative.³⁵⁸ Finally, where, under the aegis of party autonomy, the parties choose the prescription of the law of a state "reasonably related" to the transaction, deference should be given to that state's laws even though that state is not the "center of gravity" of the contract and neither party is affiliated with it. This principle is subject to the laws of the *lex situs* and subject further to the proviso that third parties are not affected by it.³⁵⁹

These principles of preference incorporate only torts, contracts

357. *Id.* at 139-80.

358. *Id.* at 181.

359. *Id.* at 194.

and conveyancing. Just how applicable this is to the vagaries of these fields and all others is a matter of conjecture. Currie and Cavers said little or nothing about marital problems and, (so far as this writer is aware), only one really definitive statement by the governmental interests school has been directed to the problems of marriage and divorce in the conflict of laws.

e. Observational standpoint

It has already been noted that theorists working within the legal process framework did not consistently distinguish between theories of and theories about PIL. The choice of law process is no exception. The principles of preference suggest, in a modest and nearly grudging manner, that the solution to the choice of law problem reposes in the development of theories (perhaps principles of preference) about PIL. But Cavers probably sees these principles as a very modest adjunct to an already circumscribed decisional role for the jurist in PIL. This, in turn, suggests that the role of observer and decisionmaker are not sufficiently distinguished. The decisionmaker is limited in the arena of effective choice by having to conform to community expectations about demanded public order. It is critical, however, that the observer "create and maintain a *functional* theory which enables him realistically to perform the indispensable intellectual tasks in reference to the flow of authoritative decisions and the accompaniment of *conventional* theories employed to explain and justify decisions."³⁶⁰

f. Focus of inquiry: comprehensiveness in conception of relevant community

Cavers and Currie essentially accepted the same central concepts of dualistic positivism.³⁶¹ Hence Cavers' capacity to articulate a more

360. Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 380 (1971).

361. Cavers first formulated his "result selective" approach in 1933. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933). He contended that when faced with a multi-state case, a decisionmaker should look at the substantive rules of all the forums involved in the case and select the rules most suitable to a solution in light of the circumstances and factors present in the specific case. This view is opposed to the more traditional view which recommends a clear selection between the rules of one state or another. Other important works on the choice of law problem by Cavers include D. CAVERS, *THE CHOICE OF LAW PROCESS* (1965); Cavers, *A Critique of the Choice-of-Law Problem: 1972 Addendum*, 17 HARV. INT'L L.J. 651 (1976).

Currie has recommended a "governmental interest" analysis as an approach to the choice of law problem. For a compilation of Currie's most noted work on conflicts of law, see B. CURRIE, *supra* note 309.

inclusive concept of community was crippled at the outset. What distinguishes Cavers is that he would not accept the logical limits of this framework. For the narrow margin of cases dealing with so-called "true conflicts," he postulated his principles of preference, the criterion of validity of which, to use a dualist assumption, reposed in Cavers himself. Cavers participated in the creation of transstate perspectives about control and authority in PIL. This breakthrough was a significant concession, in the legal process paradigm, to the reality and relevance of at least some kind of transstate inclusive community policies for PIL.

g. Comprehensiveness in conception of law

—Balanced emphasis between perspectives and operations

Cavers implicitly accepts the need for an "objective" concept of law and, therefore, an objective concept of PIL. How did such a concept affect a proper balance between perspectives and operations? First, the lack of a comprehensive concept of community makes it nearly impossible to focus on a more comprehensive (or inclusive) and, therefore, realistic appreciation of perspectives. Cook and Currie, as earlier suggested, could be seen as literally denying transstate perspectives altogether. Cavers, however, sought to distill a narrow range of such perspectives in his principles of preference for a small range of problems that could not be logically accounted for in the legal process paradigm.

The basic problem with Cavers' principles, if they are to be representative of transstate perspectives, is that they aspire to do too much with too little. These principles purport to be more than simply a kind of "rule" or some other inference guidance device; they purport to displace or at least simplify the entire decision-making process.

The serious methodological question implicit in the principles is this: If the "rules" of PIL were admittedly threadbare as the realists had shown, would a slightly higher level of abstraction make a significant contribution to the accretion of sensible results? The chief weakness of the "rules" is that they aspire to simplify the decision process by purporting to eliminate the social context. The normative ambiguity of rules, and to some extent principles, have been more than adequately demonstrated in the past.³⁶² The critical question posed by

For a discussion of various approaches to the conflict of laws problem, including an analysis and explanation of the works of both Currie and Cavers, see Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism*. 14 Mo. L. Rev. 407 (1975).

362. The "lex loci" rules sought, by means of short Latin phrases, to perform multi-

Cavers' principles is this: Can "principles of preference," a conceptual technique of marginally higher level abstraction than the "rule" preferences, be a substitute for the principle of contextuality? It seems highly artificial to set out a program of middle-to-low-level abstractions as the priorities of the specialized features of the transgroup social process geared to transgroup deprivations, without even a vague account of this process and with only the barest account of its normative basis. To pretend that one can account for these realities within the structure of merely five principles, and to provide for an adequate taxonomy of decision as well, is to demand much faith and fortitude of any reader.

The problem with all of these formulations is not that one agrees or disagrees with them; it is that they purport to be a substitute for making a rational decision in context. This is not to say that the problem of choice is a simple matter. Rather, the taxonomy of any and all of these principles of preference is simply inadequate if it is meant to be a taxonomy of all transstate perspectives relevant to the process of decision in PIL. The following is but one illustration of the simplistic assumptions that inhere in these principles. Cavers correctly sees that there is a major problem with regard to degrees of culpability and the legitimate expectations that people have when they are involved in transgroup delicts. But he accounts for these by making enormous assumptions about territoriality and how the spatial condition seems to exclusively frame the subjectivities of the self about tort liability across group lines. The spatial dimension is not the only criterion for imputing such outcomes. Cavers' principles purport to account for community expectations through time and space, without an elaborate decision procedure whereby all indices relevant to particular problems can be brought to the focus of decision. Thus, the structure of policy fluctuates between a notion of equitable fairness in the allocation of indulgences and detriments, and the idea of optimality in a peculiarly atomized sense which is operationalized by a quite mechanistic formula. Aggregate expectations about optimality are not essentially accounted for, nor is there an explanation of where the author stands on this question.

The problem here is that the idea of public order is unrefined. The principles of preference carry a peculiarly positive aura but their genesis is essentially neutral. Why Cavers should have been so conservative is to be found in his unconscious identifications with the role of the

ple intellectual tasks. For the definitions and functions of these rules, see, e.g., DICEY AND MORRIS ON THE CONFLICT OF LAWS 27 (J. Morris 10th ed. 1980). Currie's interest analysis theory was also criticized for the normative ambiguity of such concepts as "governmental interests." See *supra* note 286 and accompanying text.

judge as the legal process school defines it. Essentially, the principles of preference betray the same normative ambiguity of rules, a point that led Professor Baade to question whether the book, *The Choice of Law Process*³⁶³ was an alliance (against formalism) for progress, or a counter-revolution. If this criticism is sound, it follows that "rules" or "principles" are a poor substitute for the distillation of perspectives about a comprehensive social process, characteristic of PIL. One may therefore conclude that there is no balanced emphasis between perspectives and operations in *The Choice of Law Process*.³⁶⁴

—Clarity in conception of authority and control

The criticisms made with regard to Professor Currie are equally applicable to Professor Cavers regarding their appreciation of the dynamics of authority and control in PIL. Although Cavers' principles of preference acknowledge the importance of myths to decision, the basic emphasis is still less on indices sustaining the allocation of substantive values, than the narrower emphasis on procedural goals. The other criteria for evaluating Cavers' work are essentially reflected in the critique made of Professor Currie's governmental interests analysis perspective.

h. Appraisal

The appraisal made with reference to Professor Currie's use of the legal process framework are in large measure germane to any appraisal of Professor Cavers' later work. This appraisal will, therefore, focus on the essential differences between Cavers and Currie and how these differences have undermined the conceptual basis of the legal process paradigm.

Currie "gave up" when confronted with a PIL claim that involved what he called a "true" conflict where the forum was itself a "disinterested third state."³⁶⁵ Cavers took up the challenge but was forced back on what are essentially "subjective" value preference principles. *Both perspectives within this school have in their own terms had to concede or transcend the limits of their own paradigm.* Thus Cavers, whether he was conscious of it or not, by writing into the legal process paradigm his own recommended scholar's subjectivities, undermined

363. D. CAVERS, *supra* note 356.

364. *Id.*

365. In his later writings, Professor Currie urged that judges should be restrained in the identification of forum interests. This has been characterized as Currie's theory of the restrained and enlightened forum. See Currie, *supra* note 271, at 758. See also Traynor, *supra* note 269.

the essential externality or objective basis of this school as set out by Holmes. The scholars in the legal process school in PIL have more than amply demonstrated, *in their own terms*, that the facts that are the precondition for a realistic and comprehensive theory about PIL are quite unruly. Thus, in order to make their own framework credible in PIL, they have had to essentially change, in a fundamental way, the conceptual basis of their own paradigm, even if this is done in a cautious and near minimalist manner.

It remains only to reiterate the point that Cavers does not provide us with a systematic effort or taxonomy of just how policies are clarified in terms of common interest; in terms of their relative inclusivity or exclusivity; and in terms of the minimum and optimal priorities of the social process. Cavers' own principles are not without merit as tools for the clarification of basic community policy or common interest. But they are only partial.³⁶⁶ Just why they should be confined to a limited

366. Professor Cavers has acknowledged that his principles of preference do not necessarily add up to a theory about, or of, choice of law. In his lectures, Cavers said:

If a particular case did not fall quite within a principle as I stated it, this did not call for a choice contrary to that indicated by the principle; it simply meant that the case posed a somewhat different problem than that covered by the principle and therefore required further consideration.

Cavers, *Contemporary Conflicts Law in American Perspective*, III RECUEIL DES COURS, 77, 152 (1970). Cavers added that he felt "greater confidence in the concept of principles of preferences than in the particular principles he proposed." *Id.* at 158.

The territorial bias of Cavers' principles of preference have been honored by some courts. *See, e.g.*, *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970). This was a guest statute case involving a Pennsylvania plaintiff and a Delaware defendant who relied on Delaware's protective statute for an accident that occurred in Delaware. Following the principle articulated in *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969), that the state's contacts be measured in qualitative terms with reference to the policies and interests and underlying the particular problems, the court determined that it was faced with a true conflict. The court decided that the Delaware contacts were qualitatively greater and relied on Professor Cavers' second principle of preference to justify the conclusion. The majority opinion contains the following passage quoted from D. CAVERS, *supra* note 356, at 146-47:

Consider the response that would be accorded a proposal that was the opposite of this principle if it were advanced against a person living in the state of injury on behalf of a person coming there from a state having a higher standard of care or financial protection. The proposal thus advanced would require the community the visitor entered to step up its standard of behavior for his greater safety or lift its financial protection to the level to which he was accustomed. Such a proposal would be rejected as unfair. By entering the state or nation the visitor has exposed himself to the risks of the territory and should not expect to subject persons living there to a financial hazard that their law had not created.

Cipolla v. Shaposka, 439 Pa. at 567, 267 A.2d at 856.

Cipolla contained an eloquent dissenting opinion by Justice Roberts in which he dissected the "localization" ideas of territoriality, and rejected the "territorial" view of

range of claims in PIL is unclear from a policy science point of view. Moreover, precisely why Cavers should not have embraced a broader constellation of human values than his own minimalist contribution is never clearly explained in *The Choice of Law Process*.³⁶⁷ The final irony is this: Cavers had pioneered the importance of the methodology of decision. Yet the choice of law process recedes from decision to a kind of "institutional settlement" formula, at the expense of the contextual perspective that was, at least, hinted at in his 1933 article.³⁶⁸ In short, Cavers receded from his own challenge. Why? It may be that here again Cavers had not evidenced an uncommon degree of intellectual independence, this time from his "legal process" colleagues at Harvard.

Professor Cavers, as adopted by the majority. His interpretation of the guest statute and its transstate reach is in turn influenced by Leflar's better rule concept and by von Mehren's and Trautman's preference for the "emerging" rather than "regressing" rule. See A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 394 (1965).

It should be added that Cavers' territorially oriented principles have been influential in reinforcing choice of law methods drawing upon the seat of the relationship or the center of gravity approach. See, e.g., *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); *Haag v. Barnes*, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961); and *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954). This method is also an aspect of the "localization" technique associated with the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). These perspectives have in turn been highly influential with a "new" approach to choice of law loosely styled the "new Territorialists." See R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS, CASES—COMMENTS—QUESTIONS* (3d ed. 1981); Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 Duq. L. REV. 373, 382 (1971). Unfortunately, Professor Twerski's methodology has neither the benefits of Professor Beale's theoretical sophistication nor its rigor of analysis. It has no real theoretical basis. On the other hand, his view gains none of the benefits of modern functionalist, policy centered law. His approach appears to have encapsulated the worst of both worlds.

Finally, it should be noted that for all of the territorial emphasis of Professor Cavers' principles of preference, the technique he uses comes close to that of governmental interests analysis in analyzing false conflicts and apparently true conflicts. In his analysis of *Gaither v. Myers*, 404 F.2d 216 (D.C. Cir. 1968), and *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957), Cavers holds that his principles can

sometimes discharge a useful function by aiding a court to determine whether apparently conflicting laws produced a true or a false conflict, contrary to the statement in *The Choice of Law Process* that the principles become operative only after it has been decided that the case does not present a false conflict.

Cavers, *Contemporary Conflicts Law in American Perspective*, III RECUEIL DES COURS, 77, 191 (1970).

367. D. CAVERS, *supra* note 356.

368. Cavers, *supra* note 313.

E. *Selected Contemporary Perspectives: The American Scene*³⁶⁹

Trends in theories of or about the choice of law process have proliferated substantially since the 1971 publication of the *Restatement (Second) Conflict of Laws*.³⁷⁰ The Second Restatement does not provide as clean-cut a theoretical foundation for the choice of law process as does its predecessor.³⁷¹ Indeed, it is probably a fair criticism of the Second Restatement to say that it is an example of political and ideological compromise. Effectually, the conceptual basis of the Second Restatement does not reflect a unified, coherent and consistent jurisprudential theory about PIL. Indeed, it has sought to integrate a kind of legal pluralism which, translated into jurisprudential terms, might be seen to integrate theoretical ideas that are sometimes compatible and sometimes not. The outstanding virtue of the Restatement is that it institutionalizes a highly flexible perspective about PIL. In effect, this means that in the light of experience, theory and practice may evolve into a framework of the rational allocation of the law-making and law-applying powers of the key participants in PIL.

The polestar of the Second Restatement is the concept of the law of the "place of the most significant relationship."³⁷² This determination is to be made according to the criteria of § 6. These criteria are

369. The evaluation of these selected modern or contemporary perspectives in American conflicts' law is not meant to suggest that other views from other legal cultures do not also merit in-depth consideration. Constraints of space limitations allow one only to skim the surface of the contemporary landscape in the United States, much less do justice to it. This means that a consideration of developments in the theory of PIL abroad shall have to await a more convenient time and forum.

370. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* (1971). For a sample of some of the discussion of conflict of laws after the release of the Restatement (Second), see generally Adkins, *Conflict of Laws: Contracts and Other Obligations*, 35 LA. L. REV. 112 (1974); Hay, *Unjust Enrichment in the Conflict of Laws: A Comparative View of German Law and the American Restatement 2d*, 26 AM. J. COMP. L. (1977); Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism*, 40 MO. L. REV. 407 (1975).

371. *RESTATEMENT OF CONFLICT OF LAWS* (1934). The first Restatement sought simplicity by formulating rules that would "allocate each case to the legal system of a single state," usually offering the principle of territoriality as its criterion. D. CAVERS, *supra* note 356, at 65. Cavers, in his effort to achieve predictability and uniformity, however, often sacrificed policy and common sense considerations.

372. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 188 (1971). In the absence of any express provision by the contracting parties or any statutory provisions as to choice of law, § 188 directs the courts to use the "most significant relationship" test to determine the applicable law using the policy and practical considerations of § 6 as a guide in defining the elements of that test. For an analysis of some of the relevant issues and concerns in the contracts area of conflict of laws, see e.g., Adkins, *supra* note 370; Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 315-16 (1972).

styled choice of law principles:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular fields of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.³⁷³

The general principles of § 6 are sharpened by detailed rules and principles that operate within the framework of particular subject areas. For example, § 145 sets out the principle applicable in tort cases as follows:

§ 145 The General Principles (in Tort Cases)

- (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
- (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
 - (a) the place where the injury occurred,
 - (b) the place where the conduct causing the injury occurred,
 - (c) the domicile, residence, nationality, place of incorporation and the place of business of the parties, and
 - (d) the place where the relationship, if any, between the parties is centered.³⁷⁴

These contacts are to be evaluated according to their relative importance with respect to the particular issue. Thus, under the Second Re-

373. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

374. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). Consistent with its general approach to conflict of laws, the Restatement in § 145 regarding torts calls for deference to the local law with "the most significant relationship to the occurrence and the parties under the principles stated in § 6." *Id.* For a discussion of the central importance of the policy and practical considerations enumerated in § 6 as a thematic reference point for the other articles in the Restatement, see Westbrook, *supra* note 370, at 433-34.

statement, the key objective is to identify the state with the most significant relationship to the problem because one must look to that state's law for the rule of decision.

There are basically two phases to the technique of the Second Restatement in identifying the relevant contacts relating to states whose law might supply the rule of decision. First, reference is made to the more precise rules found in a particular subject area; second, the applicability of the rules must be evaluated under the general principles of § 6. Thus, in a tort problem, § 145, which is essentially jurisdiction selecting, must be evaluated against the principles of § 6. Similarly, the contracts rules of § 188³⁷⁵ must be evaluated against the standards of § 6. The methodological difficulties of integrating both the policy considerations of § 6 and the territorial emphasis of § 188, for example, suggest a marriage of incompatible theories about law. The territorialist emphasis on the detailed rules seems to encompass a half-hearted bow to fundamentalist vested rights assumptions; § 6, on the other hand, seems to represent a commitment to a functionalist, result-oriented idiom.

The theoretical compromises epitomized in the Second Restatement have had the advantage of broadly defining the legitimate avenues of the content and process of choice of law. It is therefore not surprising that the Restatement itself has stimulated an enormous quantum of productive scholarship in this area.³⁷⁶ It must be admitted, however, that judges and practitioners who sought to rely on the Restatement as a "quick fix" to the complexity of choice of law have, perhaps, been disappointed by its inability to meet their needs for certainty and predictability.

Three broad perspectives have emerged in the aftermath of the Restatement. First, there are those who have seen in the Restatement a flexible commitment to the definition of law-making in terms of territorialist notions. The Restatement codified a more flexible vested-rights/territorialist perspective, but rather than formulating rigid rules,

375. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

376. See *Conflict of Laws Round Table; The Value of Principled Preferences*, 49 TEX. L. REV. 211 (1971); Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10 (1977); Reese, *supra* note 372; Sedler, *Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUT.-CAM. L.J. 8 (1970); Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279 (1972); Shuman, *The Choice of Law Process: Territorialism and Functionalism*, 22 WM. & MARY L. REV. 227 (1980); Weinberger, *Party Autonomy and Choice-of-Law: The Restatement (Second), Interest Analysis, and the Search for a Methodological Synthesis*, 4 HOFSTRA L. REV. 605 (1976); Weintraub, *The Future of Choice of Law for Torts: What Principles Should Be Preferred?*, 41 LAW & CONTEMP. PROBS. 146 (1977).

such as the last event constituting a tort as being the place of the wrong, the focus has been on discovering concepts like the "center of gravity" or "seat of the relationship" of a problem.³⁷⁷ The technique from the territorial viewpoint of the Restatement has been to focus analysis on contact points creating a nexus with a concerned jurisdiction.³⁷⁸ In some formulations it is the quantum of contacts that determines which is the state of the most significant relations.³⁷⁹ This approach has also been described as involving the localization of a problem in order to determine which state's law is most significant.³⁸⁰

The second main perspective is effectually a doctrinal outcome of the first. It assumes that the scope of actual experience, under the guidance of both the Second Restatement and loosely allied methodologies of choice of law, has provided a level of experience which compels the creation of narrowly drawn rules to govern the choice of law process. These rules, it is thought, will be germane to particular policies envisioned in the choice of law principles of § 6. They would especially include § 6(2)(a), "the need of the interstate and international systems," § 6(2)(f), "certainty, predictability and uniformity of result," and § 6(2)(g), "ease in the determination and application of the law to be applied."³⁸¹

This approach was strongly endorsed from the bench in *Neumeier v. Kuehner*.³⁸² *Neumeier* involved New York and Ontario guest stat-

377. See *Haag v. Barnes*, 9 N.Y.2d 554, 560, 175 N.E.2d 441, 444, 216 N.Y.S.2d 65, 69 (1961); *Auten v. Auten*, 308 N.Y. 155, 160, 124 N.E.2d 99, 101 (1954).

378. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 comment c (1971).

379. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145 comment e, 148 comment j (1971).

380. See R. WEINTRAUB, *supra* note 245, at 363-68.

381. See Reese, *supra* note 372. Reese argues that a rules approach to conflict of laws issues is more consistent with the nature of judicial tasks than a methods approach, since the latter requires judges to ascertain the policies of other states. *Id.* at 316-17. Reese argues:

Rules are the product of policies, and it is unwise to seek to formulate a rule until the nature and range of the policies it embodies are well understood Experience should eventually develop to the point where it is possible to attempt with some confidence to state a precise rule of law.

. . . .

We have probably reached a stage where most areas of choice of law can be covered by general principles which are subject to imprecise exceptions. We should press . . . beyond these principles to the formulation of precise rules. A choice of law rule that works well in the great majority of situations should be applied even in a case where it might not reach ideal results.

Id. at 333-34.

For an example of Professor Reese's approach, see *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

382. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). For the immediate reac-

utes. A New York citizen was driving an automobile insured and registered in New York; the trip, however, was between two Ontario points.³⁸³ The automobile collided with a train, killing both the driver and his Ontario guest.³⁸⁴ The personal representative of the guest sued the estate of the New York host and the railroad. Under Ontario law, the host is liable to the guest only for gross negligence.³⁸⁵ Under New York law the plaintiff would recover.³⁸⁶ The New York Court of Appeals held the rule of decision to be that of Ontario, and the plaintiff lost.³⁸⁷ Chief Judge Fuld, writing for the majority, characterized the problem as *res nova* because the precise issue had been left open in the landmark New York case of *Tooker v. Lopez*.³⁸⁸ In that case Judge Fuld had hinted at the undesirability of the guest-host cases being decided on an apparently "ad hoc" basis.³⁸⁹ He also hinted at the notion that the evolution of the law in this area might now require "the formulation of a few rules of general applicability, promising a fair level of predictability."³⁹⁰ In *Neumeier*, Fuld suggested three rules that he thought would serve as a "sound" basis for cases involving guest statutes in the PIL context. These rules are as follows:

tion to *Neumeier v. Kuehner*, see *Symposium: Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 93 (1973).

383. 31 N.Y.2d 121, 124, 286 N.E.2d 454, 455, 335 N.Y.S.2d 64, 66.

384. *Id.*

385. *Id.*

386. *Id.* at 126, 286 N.E.2d at 456, 335 N.Y.S.2d at 68. The New York rule imposes upon the driver the duty of exercising ordinary care for the protection of a guest. *Id.* at 129, 286 N.E.2d at 458, 335 N.Y.S.2d at 71.

387. *Id.* at 130, 286 N.E.2d at 459, 335 N.Y.S.2d at 71.

388. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969) (wrongful death action. Michigan guest statute held not applicable to issue of negligence. Automobile accident in Michigan; decedent (passenger) and driver New York domiciliaries attending Michigan State University; automobile owned by New York resident and registered and insured in New York; intrastate commute).

389. *Id.* at 584, 249 N.E.2d at 403; 301 N.Y.S.2d at 532 (1969).

390. *Id.* See Hancock, *Some Choice-of-Law Problems Posed by Anti-guest Statutes: Realism in Wisconsin and Rule-Fetishism in New York*, 27 STAN. L. REV. 775 (1975); Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548 (1971); Rosenberg, *Comments on Reich v. Purcell*, 15 UCLA L. REV. 551, 641 (1968). For a rule-based view of law, see H. HART, *THE CONCEPT OF LAW* (1961). The perspective of Judge Fuld, Professors Reese and Rosenberg, and others who prefer to see concrete rules formulated to guide decision making in the choice of law process, may also echo the turn of the century perspective of F. HARRISON, *ON JURISPRUDENCE AND THE CONFLICT OF LAWS* (1919). Harrison's positivism led him to prefer an "untheoretical" choice of law process; a process that would be "solid" only if based upon "actual practice and decisions of different states, and to look to the comparison and gradual systematization of current rules, to positive laws and practical convenience rather than to deduction from speculations, however profound." *Id.* at 145.

1. If the guest, host and automobile are from the same state, that state provides the rule of decision.
2. If the host's state has a guest statute, and the guest's state does not, and the accident occurs in one of these states, the *lex loci delictus* provides the rule of decision.
3. In other situations where host and guest are domiciled in different states, the *lex loci delictus* provides the rule of decision.³⁹¹

The rules approach initiated by Fuld is still in its infancy, and it is uncertain whether this effort at the codification of experience rests on an empirical predicate that is sufficiently realistic or comprehensive so as to assure that the choices made are indeed ones that vindicate the common interest. Judge Fuld's rules have been strongly criticized,³⁹² and interest oriented scholars have shown that in terms of their approach, there is an unprovided for case, *i.e.*, a case in which no concerned jurisdiction has an interest to advance, short of altruism and generosity. From the perspective of a better rule approach or the common interest/policy-science view, there is, of course, no such thing as a no-interest case.³⁹³

The third main perspective is that which sees itself as avowedly policy-centered. It seeks to state an approach to choice of law in terms of the techniques and methods inspired by Professor Brainard Currie, techniques which have undergone subsequent judicial refinement.³⁹⁴ The developments in the area of policy-centered analysis have directed concern to several problems associated with Brainard Currie's governmental interest analysis. A substantial number of contemporary theorists accept Currie's analysis up to the point of the false conflict.³⁹⁵

391. *Neumeier v. Kuehner*, 31 N.Y.2d 121, 128, 286 N.E.2d 454, 458, 335 N.Y.S. 2d 64, 70 (1972).

392. See, *e.g.*, R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 314-18 (2d ed. 1980).

393. Cf. Baade, *The Case of the Disinterested Two States: Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 150, 161-67 (1973).

394. See, *e.g.*, *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976) (comparative impairment); *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974); *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966) (Keating, J., concurring); *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

395. According to the original version of [Currie's] theory, a court should apply its own law whenever the forum government can claim a "legitimate" "governmental interest," *i.e.* a "reasonable basis for the application of [its] law in order to effectuate the specific policies that it embodies." A competing foreign governmental interest is to be disregarded since only the legislator is capable of prop-

Upon further study it has been urged that many conflicts described in Currie's system as "true" conflicts are not so in reality.³⁹⁶ Hence, it is claimed that an additional problem exists in separating these "apparently" true conflicts from true conflicts. Of course, apparent conflicts are those kinds of cases that, upon further analysis, are shown to be false conflicts; presumably, the term apparent conflict disguises what is really a false conflict.

Two leading candidates for the status of apparent conflicts are *People v. One 1953 Ford Victoria*³⁹⁷ and *Bernkrant v. Fowler*.³⁹⁸ In *One Ford Victoria*, a Texas chattel mortgage was honored in a seizure-forfeiture action against the chattel.³⁹⁹ California law was construed to not reach a Texas secured creditor-debtor transaction.⁴⁰⁰ In *Bernkrant*, the Nevada plaintiff's suit to enforce a contract to make a will was held not subject to California's statute of frauds.⁴⁰¹ *One Ford Victoria* and *Bernkrant* may be viewed as either true or apparent conflicts.⁴⁰² In

erly weighing and deciding between conflicting interests.

A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 62 (1967) (citing Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1361 (1960)). Thus, so long as the forum could assert any arguable governmental interest, an apparent conflict would arise and the forum law would apply without any reference to the foreign interest. It has been asserted that "all courts and writers who have professed acceptance of Currie's interest language have transformed it by indulging in that very weighing and balancing of interests from which Currie refrained." Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 389 (1966). This weighing served to unmask spurious conflicts that would have slipped by Currie's analysis.

396. In response to the heretical weighing of interests by his professed adherents, Currie developed the theory of the more moderate, restrained and enlightened forum which, upon finding an apparent conflict, would take a second look and altruistically subordinate forum self-interest in the face of foreign interests and a desire for the "minimization of conflicts problems and the advancement of a stable legal order." B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 525 (1963). "In its final form, Currie's theory permits and expects courts to apply foreign laws even in the presence of a legitimate forum interest." I A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 65 (1967). Currie thus implicitly allowed cases which would have been apparent conflicts under his original theory to now be viewed as false conflicts. This altruistic evaluation of the forum interest in light of foreign interests was said to have "reopened that very problem of choice of law that [Currie] had purported to solve or to avoid and struck a telling blow in the counter-revolution against his own revolt." *Id.* at 389-90. See also Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845 (1961).

397. 48 Cal. 2d 595, 311 P.2d 480 (1957).

398. 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

399. 48 Cal. 2d 595, 599, 311 P.2d 480, 483.

400. *Id.* at 598, 311 P.2d at 482.

401. 55 Cal. 2d 588, 612, 360 P.2d 906, 910, 12 Cal. Rptr. 266, 270.

402. Horowitz sees *Bernkrant* as a "false false-conflict." Horowitz, *The Law of Choice of Law in California—A Restatement*, 21 UCLA L. REV. 719, 743-44 (1974).

each instance the forum, California, honored the law-making power of another state. Currie viewed the technique as an example of a "more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effect the forum's purpose."⁴⁰³

The technique used to solve the problems of apparent conflict as seen in *Bernkrant* and *One Ford Victoria* is not at all easy to divine from the opinions. The technique appears to involve delimitation of the problem according to criteria of domicile and territoriality. Confining the problem to two concerned states involves a court in a teleological reconstruction of the purposes to be advanced by each state's competing rules. The court circumscribes these purposes in terms of their multistate reach and formulates rational standards of expectation for the parties whose conduct is to be governed by the competing rules. In *One Ford Victoria*, for example, Justice Traynor said:

A person financing the sale of an automobile in Texas for use exclusively in that state will look to the laws of Texas for the determination of his rights and duties. He cannot reasonably be expected to familiarize himself with, and comply in Texas with, the statutes of the forty-eight or more jurisdictions into which the automobile could possibly be taken without his consent, and in violation of express contractual prohibitions.⁴⁰⁴

In *Bernkrant*, Traynor stated, "in determining whether the contract herein is subject to the California statute of frauds, we must consider both the policy to protect the reasonable expectations of the parties and the policy of the statute of frauds."⁴⁰⁵

A refinement of the Traynor conception has been reflected in several later cases emerging from the California Supreme Court.⁴⁰⁶ These cases show an acceptance of the concept of a true conflict and the court has pioneered a principle of "comparative impairment" for its solution. This principle is attributable to Professors Baxter and Horowitz.⁴⁰⁷ The principle of comparative impairment requires that the forum

403. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963).

404. 48 Cal. 2d 595, 598, 311 P.2d 480, 482.

405. 55 Cal. 2d 588, 612, 360 P.2d 906, 910, 12 Cal. Rptr. 266, 270.

406. See, e.g., *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978); *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976); *Hurtado v. Superior Court*, 11 Cal. 3d 574, 581, 522 P.2d 666, 670, 114 Cal. Rptr. 106, 110 (1974).

407. See, e.g., Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); Horowitz, *The Law of Choice of Law in California—A Restatement*, 21 UCLA L. REV. 719, 728 (1974).

"subordinate, in the particular case, the external objective of the state whose internal objectives will be least impaired in general scope and impact by subordination in cases like the one at hand."⁴⁰⁸

Another major writer who has contributed to the evaluation of an interest/policy-centered concept of PIL is Professor Leflar. He has recommended five choice-influencing considerations for the solution of choice of law problems.⁴⁰⁹ These are predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interests, and the application of the better rule of law.⁴¹⁰ The consideration relating to the advancement of the forum's governmental interests suggests that Professor Leflar accepts the true-false conflict distinction and that this consideration, in effect, makes reference to Professor Currie's mode of interest analysis. If this is correct, then the last consideration, the application of the better rule, would apply only to those cases where there is a true conflict or a disinterested forum, or in the circumstance of the unprovided-for case. However, in *Clark v. Clark*⁴¹¹ and *Milkovick v. Saari*,⁴¹² Professor Leflar's better rule of law approach has been applied to false conflict cases. This means that the concept of a better rule of law may be used to resolve not simply true conflicts and unprovided-for cases, but also false conflicts. This would seem to substantially undercut the framework of analysis implicit in Leflar's advancement of the forum's governmental interests consideration.

Leflar's better rule concept appears to be a prescription that is both bold and challenging. At the same time, however, it is problematic, for it assumes the existence of principles of procedure and content accessible to judges so that, in the tradition of comparative justice, they will choose the better rule. Leflar has argued that there is nothing startling about requiring judges to find a better rule. Indeed, in Leflar's view, "most judges are capable of" doing so.⁴¹³ Leflar maintains that a reasonable court will "prefer rules of law which make good socio-economic sense for the time when the court speaks."⁴¹⁴ Leflar believes that the preference he envisions is "objective not subjective" and that it is no more or no less result selective than any other aspect of judicial

408. Baxter, *supra* note 407, at 18.

409. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1587-88 (1966).

410. *Id.*

411. 107 N.H. 351, 222 A.2d 205 (1966).

412. 295 Minn. 155, 203 N.W.2d 408 (1973).

413. Leflar, *supra* note 409, at 1588.

414. *Id.*

decision-making.⁴¹⁵

Three major theorists who advance an avowedly functionalist approach to choice of law are Professors Weintraub,⁴¹⁶ von Mehren, and Trautman.⁴¹⁷ Professor Weintraub sees the idea that criteria of judgment ought to be determined by concern for "social consequences" as key to any functional analysis of a choice of law problem.⁴¹⁸ The focus is, therefore, upon: (1) delimiting states having a rational connection with the problem; (2) determining policies to be advanced by laws in conflict, if any; (3) determining the social consequences of advancing or not advancing, by prescription, the law of one of the concerned jurisdictions; (4) determining whether the conflict is either a false or true conflict; and (5) developing in the event of a true conflict, a rational and objective solution along functionalist lines.⁴¹⁹

There are two key choice criteria that Weintraub considers essential to the solution of a true conflict case (in the governmental interests sense of the term case). First, the choice must be made in an objective way, and "circumspection and common sense" must guide the decisionmaker towards fair and impartial results.⁴²⁰ Second, a choice of law rule or principle ought to, as near as possible, approximate actual or emerging reasonable community expectations—"the preferred national solution interstate conflicts problem."⁴²¹ These fundamental ideas are conceptualized as honoring "clearly discernible trends" and avoiding unfair surprise and anachronism.⁴²² Finally, the choice of law process should be tested in reference to a functional conception of reasonableness in terms of the purposes of the relevant rules and the connection or contacts of the parties to the particular jurisdiction.⁴²³

415. *Id.*

416. *See, e.g.,* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (2d ed. 1980); Weintraub, *The Future of Choice of Law for Torts: What Principles Should Be Preferred?*, 41 LAW & CONTEMP. PROBS. 146 (1977).

417. A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS (1965).

418. R. WEINTRAUB, *supra* note 416, at 48.

419. *Id.*

420. Weintraub, like Currie, believes that weighing the interests of concerned jurisdictions is too subjective a predicate to produce a viable choice of law process. He said that "such a weighing process is too subjective to be satisfactory for resolving a conflicts problem" *Id.* at 270.

421. *Id.*

422. *Id.* at 270-71, 273.

423. The following illustrate Weintraub's rules governing the validity of contracts:

A contract is valid if valid under the domestic law of any state having a contact with the parties or with the transaction sufficient to make that state's validating policies relevant, unless some other state would advance its own policies by invalidating the contract and one or more of the following factors suggest that the conflict between the domestic laws of the two states should be resolved in favor

Professors von Mehren and Trautman present a framework that seeks to integrate the best of both governmental interests and functional analyses in terms of a more international outlook, or one which is at least sensitive to the concept of transstate or transnational law.⁴²⁴ Like other conflicts theorists, these authors are interested in those connecting factors that delimit the problem to "concerned jurisdictions."⁴²⁵ As does Currie, the authors focus on considerations that lead a court to displace the law of the forum—to depart from the regulating rule that it would use in a wholly "domestic" problem.⁴²⁶ In step with the First Restatement, they believe that rules or prescriptions that give a multistate solution to a multistate issue do exist because of the "special" multistate nature of the problem.⁴²⁷

of invalidity:

- 1) The invalidating rule reflects a viable, current trend in the law of contracts such as the growing concern for protection of the party in the inferior bargaining position;
- 2) The invalidating rule differs in basic policy, rather than minor detail, from the validating rule;
- 3) The parties should have foreseen the substantial interest that the state with the invalidating rule would have in controlling the outcome;
- 4) The context of the contract is noncommercial;
- 5) The courts of the state with the validating rule have, in similar interstate cases, deferred to the policies underlying the foreign invalidating rule.

Id. at 382. The following are the rules for torts:

1. "False conflict" cases: If, in the light of its contacts with the parties or the transaction, only one state will have the policies underlying its tort rule advanced, apply the law of that state.
2. "True conflict" cases: If two or more states having contacts with the parties or the transaction will have the policies underlying their different tort rules advanced, apply the law that will favor the plaintiff unless one or both of the following factors is present:
 - a. That law is anachronistic or aberrational.
 - b. The state with that law does not have sufficient contact with the defendant or the defendant's actual or intended course of conduct to make application of its law reasonable.
3. "No interest" cases: If none of the states having contacts with the parties or the transaction will have the policies underlying its tort rule advanced, apply the law that will favor the plaintiff unless one or both of the following factors is present:
 - a. That law is anachronistic or aberrational.
 - b. The state with that law does not have sufficient contact with the defendant or the defendant's actual or intended course of conduct to make application of its law reasonable.

Id. at 346 (footnote omitted).

424. A. VON MEHREN & D. TRAUTMAN, *supra* note 417, at 215.

425. *Id.*

426. *Id.*

427. *Id.*

The determination of whether a "domestic" rule should be given multistate reach is not to be done only in terms of the policy basis of the rule, but should also be made in light of transstate interests implicit in such notions as reciprocal tolerances, promotion of transstate interaction, and multistate expectations that are justifiable in context (equality, fairness, economy, and simplicity).⁴²⁸

The solution to conflicts between concerned jurisdictions lies partly in acknowledging that many conflicts are false.⁴²⁹ Cases eliminated as false conflicts may be decided according to criteria defining a "predominantly" concerned jurisdiction.⁴³⁰ The most arresting and original part of the von Mehren-Trautman contribution is not in the area of false conflicts but rather in their handling of a true conflict, an approach which seems to presuppose the absence of a jurisdiction of predominant concern. For such cases the suggested approach proceeds to: (1) determine "how strongly" a state holds to a particular rule/policy; (2) consider whether this rule/policy reflects "emerging" or "regressing" law; (3) insure that the decisionmaker is sensitive to nuances of particular problems and general criteria; (4) consider the significance or harshness of an outcome in the application of a particular state's rule; and finally (5) consider the distillation of common multi-jurisdictional policy of all concerned jurisdictions for selected classes of problems.⁴³¹

Von Mehren and Trautman concede that having done all the above, there may still be no obvious jurisdiction to supply the rule of decision.⁴³² Here different cases may be solved by different common sense considerations. The decisionmaker may adopt the rule that promotes interstate activity or party autonomy. If the problem is intractable, the law of the forum, if it is a concerned jurisdiction, may be applied by the decisionmaker. Expanding on this theme, Professor von Mehren has advanced the thesis that for true conflict situations there are two inherently fundamental objectives. First, the domestic rule of a court is a measure of justice. Forced to mediate between equal treatment of litigants and the enhancement of preferred values, von Mehren would allow a court to apply its own internal rule to the prob-

428. *Id.* at 233-304.

429. Doctrinally, Currie would disagree that a case like *Milliken v. Pratt*, 125 Mass. 374 (1878), is a false conflict.

430. The cases cited in support of the law of the predominantly concerned jurisdiction includes cases that are obviously false conflicts, e.g. *Babcock v. Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963).

431. A. VON MEHREN & D. TRAUTMAN, *supra* note 417, at 403-08.

432. *Id.*

lem.⁴³³ Second, a "compromise" solution may be found between the two domestic laws in conflict.⁴³⁴ Avowedly this solution involves a court in a law-creative enterprise: the creation of transstate law for the choice of law process. Although this proposal is carefully framed and confined to a narrow spectrum of new intractable problems, it is a significant doctrinal and jurisprudential point and has vast implications for the development of PIL.⁴³⁵

Von Mehren and Trautman's solutions for a rational choice of law process involve the judge in a more complex function than that seemingly allowed by Professor Currie and his followers. In contrast to von Mehren and Trautman, Currie believed that judges should not indulge in the function of policy-weighting.⁴³⁶ Professor Weintraub also eschews policy-weighting or balancing as too subjective an enterprise for judge-made law.⁴³⁷

The perspectives encapsuled in the Second Restatement, as well as those inspired or reinforced by it, are, of course, creatures of contemporary legal culture or ideology. This culture, at least in the United States, is complex, conditioned not only by socio-political and economic conditions, but also by complex advances in our understanding of the nature of decision and legal processes. Hence, contemporary perspectives reflect both the influences of the traditional, immediate past geared to a fundamentalist kind of positivism, and of those develop-

433. von Mehren, *Choice of Law and the Problems of Justice*, 41 LAW & CONTEMP. PROBS. 27, 43 (1977).

434. *Id.* at 36. See also von Mehren, *Special Substance Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347, 366 (1976).

435. Professor von Mehren has written numerous articles on the theory and methodology of contemporary choice of law. His dissatisfaction with the fruits of contemporary perspectives is, he believes, a function of the "apparently intractable nature of the problems. . . . Intricate and subtle analyses are undertaken; ambiguities and uncertainties are painfully resolved. Ultimately, a result is reached, yet the solution is too frequently neither entirely satisfying nor fully convincing." von Mehren, *supra* note 433, at 27.

For special, narrowly drawn situations, Professor von Mehren feels that the creation or generation of special multistate rules—reflecting a compromise between divergent state laws—is needed. Professor von Mehren suggests several arguments to support this position. First, he urges that "[t]heoretically, choice between two principles of justice in question—equal treatment and the advancement of values—should be avoided whenever possible." *Id.* at 30. Second, he argues that "[n]o choice-of-law methodology can harmonize the principles of equal treatment and of advancing values in all cases." *Id.* at 32. It will be seen that in this study an effort has been made to respond in some degree to the challenge to international justice that PIL problems present. The view taken here is one of more optimism than that of Professor von Mehren.

436. Currie, *supra* note 403, at 758-59.

437. R. WEINTRAUB, *supra* note 416, at 270.

ments made in the area of sociological (*i.e.*, realist) thought. These influences can be traced in the writings of scholars as well as in appellate court judgments in the area. Yet, it is still a fair criticism of the modern trend that the teleological aspect of the sociological-functional perspective remains underdeveloped in articulating transstate and transnational values in context. It is also a reasonable complaint that the scientific aspect of the sociological approach, (*i.e.*, depicting the behavior, the living law and the facts of transstate interactions, of key participants in the law-making and law-applying process in a multi-state context) remains unexplored.⁴³⁸ This does not mean that much progress has not been made. It does suggest that more theoretical work needs to be done to secure a framework that meets articulate jurisprudential criteria of evaluation. An infra-structure of theory would thereby be established that will secure a more enlightened and challenging operational PIL.

1. Observational Standpoint

The Second Restatement gives scant guidance as to the importance of standpoint. Sometimes the perspective is one of a decisionmaker concerned with describing trends in practice; sometimes the standpoint shifts to perspective, and often to the distillation of perspectives larger than necessarily embraced by those charged with decision. The complex combination of recommended methodology and black-letter rules makes it difficult to secure a clear-cut distinction between observing, deciding, and demanding. Still, the Restatement is an important instrument for deparochializing the perspectives of both decisionmaker and scholar; the Restatement goes a long way toward creating transstate expectations: transstate law. The effort to restate PIL from the perspective of a "neutral" forum is helpful in attempting to move in the direction of developing a theory "about" rather than

438. This criticism will become more apparent as recent trends in theory are evaluated against the criteria of evaluation suggested in this article.

According to Professors McDougal, Lasswell, and Chen the concept of interests refers to "a pattern of demands for values plus the supporting expectations about the conditions under which these demands can be fulfilled." M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 409 (1980). Common interests are described as those "which relate in empirical reference to activities with inclusive impacts, express demands compatible with human dignity, and are supported by realistic expectations of interdetermination, as demonstrated in reciprocal tolerance and mutual accommodation." *Id.*

In contrast, special interests are those interests that "though relating to activities having inclusive impacts . . . are destructive of common interests . . . in the sense that the demands asserted are incompatible with human dignity values and the expectations entertained do not include reciprocity and mutual accommodation." *Id.*

"of" PIL. Yet it would be helpful to the evolution of this field if more concern had been accorded to the question of standpoint. Perhaps the central criticism of this contemporary trend is the tendency still to identify interests, almost exclusively, with state interests. This is a primary positivist assumption: the law and the state are one. The key point is that state interests may or may not be coextensive with common interests, yet only the observer can clearly see this. Hence, the tendency toward parochial less inclusive conceptions of common interest is still an important contemporary element. A recommended and conscious identity with the common interests of all humankind would be a significant improvement in our current perspectives.

2. Focus of Inquiry: Comprehensiveness in Conception of Relevant Community

The focus on the advancement and/or mediation between state interests, so characteristic of contemporary PIL, has meant that core features of the interstate and international process are often not accorded the importance in analysis that they require. The conditions that prescribe interdetermination and interdependence of community process across state lines are often underappreciated because scholars assume that law-making is a discrete group or state phenomenon, rather than a multi-group phenomenon. Concessions made to this assumption are modest and confined to special circumstances such as "true conflict" contexts or conceptions of compromise when problems are seen as intractable. A recognition that in a multi-group, multi-state, and national world, complex law generalizing interaction takes place requires a much more inclusive concept of community than is evidenced in either contemporary theory or practice.

3. Comprehensiveness in Conception of Law

a. Balanced emphasis between perspectives and operations

Two primary limitations of the contemporary scene have been the inadequacies in articulating the character of the perspectives that should guide decision-making and a lack of concern for more empirical data to appreciate the practically relevant behaviors of the key law-making actors in PIL. Newer formulations have sought to cautiously prescribe narrow rules having a sounder empirical basis. These innovations in theory represent progress. On the other hand, the inability to distill perspectives of multi-jurisdictional dimensions, or to realize them in grudging terms, means that theory has fallen short in understanding the normative as well as the practical-operational dimension, of context in this area.

b. Clarity in conception of authority and control

One of the central failures of conflicts scholarship is the assumption that authority and the state are synonymous. Transnational interaction often frees pivotal aspects of behavior from the control and regulation of state process viewed in discrete terms. The problems that arise, therefore, are ones that require a sensitivity, not simply to state perspectives of authority, but also to a broader constituency of participants. Realism demands no less. Perspectives grounded in authority make this imperative. Already it has been shown that the dimensions of control in the multi-state context remain underdeveloped. Yet law-making and law-applying in the PIL context cannot be effective or just without appreciating more readily the nature of control and the dimensions of authority in this sphere.⁴³⁹

4. Classification of Decision: Public Order, Constitutive, Civic Order

Already stressed has been the importance of recognizing the different types of decisions: those that are system-maintaining or constitutive; those that primarily serve the function of value allocation, often other than power; and those kinds of decisions that are better left to private volition. Such a scheme is particularly valuable to any viable theory about PIL and should help to clarify the nature and substance of diverse decision roles. That little explicit theorizing is done about multi-state and multi-national conceptions of public and civic order or about the broader emerging though rudimentary constitutive processes of the larger world arena, accentuates the myth that in international affairs, disputes are better resolved by the exercise of naked power. The recognition of the role of PIL in the public and civic order of the world community and its system of maintaining dimensions in the constitutive sphere could substantially enhance the relevance of contemporary perspectives.

439. See McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968).

Some theories [of international law], unable to observe the patterns of authoritative expectation and control which in fact transcend nation-state boundaries, have concluded that international law is not really law at all, but only "positive morality," and that most decisions of transnational impact or reference are taken by mere naked power, expediency, or calculations of special interest.

Id. at 194.

5. Intellectual Tasks

a. Clarification of community policy

Modern theory has made substantial advances in the clarification of community policy. The technique has failed, however, in not honoring a broader and more realistic concept of community. It is in the area of policies germane to the well-being of the larger world arena that conflicts theory has been found wanting. This may be the result of all theorists being wedded to the notion that one's "law view" must be "objective," and hence one's own value scheme, if it is to condition one's "law view," must also be "objective." This problem has been directly addressed by the existential philosophers: choice and the responsibility for choice lies with man and not with extrinsic forces.⁴⁴⁰ The suggested way out of the dilemma of objective-subjective "law" and "value" is in the notion of the postulation of overriding goal values: that value being human dignity. From such a position the clarification of values and policy becomes a more stable and coherent enterprise. Again, it will be seen that narrow conceptions of justice or optimum order pervade the PIL literature, and preferred solutions are formulated in the ambiguous forms of positive neutralism or "least bad" scenarios.

b. Description of past trends

Description of trends in perspective as well as what courts in fact do is a well executed task in this era. Where the trend has been less than effective is in the descriptions of law-making processes of PIL that are not necessarily court-centered. A richer conception of how law and particularly international law is made and applied should greatly enrich this task in the PIL context.

c. Explicit postulation of public order goals

While some modern writers have been willing to introduce a small subjective element into the scheme of values to decide hard cases in this field, they have been unwilling to comprehensively evidence a larger, more inclusive concept of justice, by postulating rather than justifying the concept of human dignity and the common interest as the enhancement of human dignity. As value conflicts become more intrac-

440. See generally H. BARNES, *EXISTENTIALIST ETHICS* 3-123 (1967). "The free individual is restricted factually by his own future, the projects of other free individuals, and the stubborn resistance of the outside world; he cannot be subject to ethical principles, for he alone decides whether or not he wishes to attach a value to the ethical." *Id.* at 49.

table, it may be that more scholars will find appropriate normative guidance in not only the values in the common core of legal concepts, but also in the United Nations Charter,⁴⁴¹ the Universal Declaration of Human Rights,⁴⁴² and all the other instruments and processes evolving to enhance the dignity of man.

d. Projection of future trends

Prediction in this field is, as all conflicts scholars know, a hazardous enterprise. Needless to say, writers have been extremely circumspect in predicting trends.⁴⁴³ The inability to predict the outcomes of decision with reasonable probability is extremely destabilizing to many areas of multistate human interaction and modern perspectives have not mightily improved prediction.

e. Alternatives

Changes in PIL thinking have been radical. Yet a genuinely new paradigm of or about law has not emerged. Alternative constructs have been rooted in the past and have wavered about venturing into uncharted seas of the future. The landscape contains alternatives, but these share the same or remarkably similar jurisprudential bases, and carry the pitfalls of these perspectives.

Not nearly enough focus is given to both environmental and predispositional conditions that influence decision. While theorists have given weight to environmental factors occasionally,⁴⁴⁴ the search for objective law often obfuscates the predispositional dimension in decision. Yet, in a world of complex interlocking, complementary, and sometimes conflicting identifications, it would seem that a concern for the conditions that predispose decisional behavior should be a significant intellectual task.

441. See U.N. CHARTER art. 1, paras. 2 & 3, art. 13, para. 1(b), art. 55, art. 56. The preamble states that one of the purposes of the United Nations is "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. . . ." *Id.* Preamble.

442. See Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217, U.N. Doc. A/810 at 71 (1948).

443. See, e.g., Alexander, *The Concept of Function and the Basis of Regulatory Interests Under Functional Choice-of-Law Theory: The Significance of Benefit and the Insignificance of Intention*, 65 VA. L. REV. 1063 (1979). "Fundamental to developing a coherent theory of interests is the concept of the purpose or 'function' of rules." *Id.* at 1064.

444. See M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 438, at 38-44.

F. Appraisal of Past Theories

The fundamental problem posed by PIL is the rational allocation of law-making and law-applying competence of concerned bodies politic to assure that such allocations are done in the common interest. In the broad sense, one is concerned with the allocation among bodies politic, including states, of the "competence to make and apply law to the transnational or transgroup events that affect them."⁴⁴⁵ The actual exercise of such competence should invariably reflect a subtle, but realistic calculation of the "differential impact of transnational activities, irrespective of the state or non-state character of the actors, upon the members, resources, and institutions of different states."⁴⁴⁶ To realistically appraise past trends in theory requires that one evaluate such theory in the light of both the nature of the problem posed in PIL as well as the desired objectives of the response thereto.

The historical experience of PIL perspectives reflects legal developments that are both universalist and parochial. Universalist perspectives have, in general, tended to be sensitive to the reality and utility of transgroup perspectives. Parochial perspectives have often sought a closer alignment with the operations and practices of a particular body politic and have tended to undermine a sensitivity to the broader outlook.

The Roman law, as it ultimately matured, built not only upon the rigid and parochial *jus civile*, but also on the broader perspective reflected in the *jus gentium* and the *jus naturale*. The PIL-type problem must have emerged in Roman law because of internal conflicts between Peregrines and Romans.⁴⁴⁷ Although precise linkages are hard to trace, and although the Peregrine Praetor's edict does not survive, the evidence of recourse to inclusive standards of the *jus gentium* and *jus naturale* is pervasive in Roman legal culture. Deference to inclusive standards for the solution of choice of law problems are also to be found in the work of the Statutists and in Story's concern for promoting inclusive common interests.

The evolution of PIL as a discipline emerged more clearly in the European context as nation-states became more identifiable and discrete. As the resulting power complexities involving emerging nation-states became more acute, legal doctrines emerged that sought to ra-

445. McDougal & Jasper, *The Foreign Sovereign Immunities Act of 1976: Some Suggested Amendments*, in *PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS* 6 (M. Landweher ed. 1981).

446. *Id.*

447. See, e.g., F. VON SAVIGNY, *PRIVATE INTERNATIONAL LAW* §§ 354-57 (2d ed. 1880 & photo. reprint 1972).

tionalize the control over the fundamental bases of power of such groups. Two of the most obvious bases of such power are territory and people. The search of legal scholars thereafter was for doctrines that would secure a reasonable accommodation between conflicting claims of more than a single body politic to make and apply law for events occurring or impacting in their territory, or with respect to persons in some affiliation with them. The famous classification prescriptions of the Glossators, real statutes [territory], personal statutes [persons], and mixed statutes [persons and territory], were a significant doctrinal effort to develop a legal myth for the law-making and law-applying process cutting across state or group lines.⁴⁴⁸ The seventeenth century saw the demise of Christian Universalism under the authority of Rome. The Westphalian Peace Treaty of 1648⁴⁴⁹ gave a juridical imprimatur to the claims to group autonomy and self-determination on the continent of Europe. The outcomes of Westphalia and the events leading up to it were the modern nation-state buttressed by the legal myth of sovereignty and the political myth of independence. The impact of the truncation of the European political landscape meant an increased decentralization in the allocation of law-making and law-applying power among sovereign nation-states. While the need for transstate perspectives of authority and control increased as a result of these legal and political developments, the impulse to parochialism also flourished as power became more widely distributed. The Statist paradigm of Westphalia generated much narrower and parochial perspectives about PIL and, in extreme forms, sought to deny the reality and, indeed, the utility of transstate perspectives of authority and control.

The Dutch school did not discard the notion of transstate law, but did circumscribe its doctrinal evolution at the altar of self-determination and political independence. The deference to the principle of comity, *comitas gentium*, kept alive a thread of universalist values.

The monumental contribution of Joseph Story on this side of the Atlantic represents almost an historic anomaly. The nineteenth century saw the more concrete formalization of a kind of European state *rechtsgemeinschaft*, which was accelerated by the Congress of Vienna and the Concerts of Europe.

The emergence and triumph of legal positivism as the predominant law-view, however, served to undercut Justice Story's contribution, especially as to the aspect supported by his natural law inclinations and his sensitivity to broader normative standards loosely associated with universalist values. The fundamental problem posed by

448. See *supra* note 3.

449. Peace of Westphalia, 1648, 1 Parry's T.S. 1.

such a perspective in the eyes of a legal positivist is simple: Universals cannot be stated. They comprise statements that are not scientifically verifiable, and are therefore meaningless.

The view closely associated with positivism that came to prevail in England and the United States was the so-called vested rights approach. This perspective rested on the assumption that law is closely identified with the notion of state-sovereignty. In its doctrine and method, however, it sought to provide a transstate perspective of such formal abstraction that its process lost sight of the social facts of the transstate process and revealed itself as a poor response to the problems generated in PIL.

The Legal Realists, working in the PIL context, spent much of their energy demolishing the vested rights perspective and demonstrated the nature of the problems, and challenges, that required a response from the decision-making process. While they suggested that a social science perspective required the formulation of theories *about* rather than of law, they suggested only vague outlines about where to go. The focus on decision, policy and function, however, still contained the seeds of a newer paradigm.

During the post-World War II period three predominant approaches to jurisprudence emerged in the wake of the American Realist Movement. The first is the refinement of the analytical approach in terms of ordinary language analysis under the influence of J.L. Austin⁴⁵⁰ and Professor H.L.A. Hart.⁴⁵¹ The second was the effort to redefine the central jurisprudential questions in terms of role and function by Professors Hart and Sacks in their casebook, *The Legal Process: The Making and Application of Law*.⁴⁵² This approach to the legal process had a major influence on leading conflict of laws writers in the United States, especially Professors Cavers and Currie. The work of these scholars has significantly advanced the understanding of the institutional roles of the various actors and has contributed much to one's understanding of the subject. Yet the limits of this perspective have served to restrict the evolution of a broader outlook of an international-comparative vantage point.

The third jurisprudential perspective is that of the policy-sciences associated with Professors McDougal, Lasswell and their collaborators.⁴⁵³ Their work on the public order of the world community has

450. See, e.g., J. AUSTIN, *supra* note 106.

451. See, e.g., H. HART, *THE CONCEPT OF LAW* (1962); Hart, *Definition and Theory in Jurisprudence*, 70 L.Q. REV. 37 (1954).

452. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING & APPLICATION OF LAW* (tent. ed. 1958).

453. See, e.g., McDougal, *Human Rights and World Public Order: Principles of Con-*

sought to bridge the gap between so-called public and private international law, although with exceptions, they have been most influential in the general international law area. New social facts in the earth-space system, new technologies, accelerating patterns of interaction in trade, education and all other areas of value-significance have profoundly changed the character of the problems posed in this field. To this should be added the development in the international law areas where the individual is increasingly recognized factually and juridically as an integral part of the global system. More importantly, the normative significance of the development of human rights standards has provided a new reality and a new and bolder challenge for PIL. This requires new thinking: a new paradigm.

A theory about PIL should be realistic and comprehensive. Such a theory would maintain a concern for the appropriate observational standpoint; it would seek to describe a concept of community in terms larger than the nation-state; the conception of law would be cast in broader terms to embrace the core features of control as well as the central symbols of authority that operate in the system. Additional criticisms raised in this survey concern the following: the clarification of kinds of decision, the performance of intellectual tasks, the classification and clarification of policy, and the task of postulating preferred public order goals. The limited perspective implicit in past theoretical formulations has evidenced a critical lack of appreciation for the *potentialities* inherent in the PIL framework for a better world order.

A decision made in the PIL context sensitizes participants at all levels to an ongoing educational and deparochializational process which intensifies as decisions are operationalized and diffused into the social patterns of affected bodies politic. PIL is thus an important instrument for effectuating ordered social change in a turbulent world.

tent and Procedure for Clarifying General Community Policies, 14 VA. J. INT'L L. 387 (1974); McDougal, *The Impact of International Law Upon National Law: A Policy Oriented Perspective*, in STUDIES IN WORLD PUBLIC ORDER 157 (M. McDougal ed. 1960); McDougal, *International Law and the Future*, 50 MISS. L.J. 259 (1979); McDougal, *International Law, Power and Policy: A Conception*, 82 RECUEIL DES COURS 137 (1953); McDougal & Lasswell, *Criteria for a Theory About Law*, 44 SO. CAL. L. REV. 362 (1972); McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959); McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968); Reisman, *A Theory about Law from the Policy Perspective*, in LAW AND POLICY 75 (D. Weisstub ed. 1976).

IV. AN ALTERNATIVE PARADIGM

A. *Recommendations*

A new paradigm about PIL is one that would initially seek to deparochialize the subject. In other words, in the quest for realism, one develops the central components of social interaction on a global scale. The central features of a new paradigm would therefore describe:

(1) The broad outlines of the world social process. This context should enable one to describe, in greater detail, the central contextual features of the many specialized value processes of world society. These value processes include, among others, the domestic relations [affection] process and the wealth operating [international transactions] process.

(2) The processes of claims to principles of transnational and transgroup jurisdiction: claims to law-making and law-applying power in the context of each value process.

(3) The unique features of the transnational constitutive process and the decisional process that responds to claim assertion.

(4) The goals and policies that epitomize the common interest of mankind and the manner in which they relate to diverse contexts and claims.

(5) The trends in decision and conditioning factors that determine the allocation of indulgences and deprivations.

(6) Potential alternatives for the greater realization of human dignity goals where actual practice is divergent from such normative goals.

B. *Process of Interaction in PIL*

Earlier in this study, the central importance of contextual background of PIL was stressed. In the broadest possible sense, that background is the world social process. An economic way to touch the salient aspects of this process is through the use of a phase analysis. Social interaction essentially involves human beings pursuing values, sometimes cross-culturally, through institutions, based on resources. The global or world social process background of PIL involves, *inter alia*, participants in "groups." The relevant background therefore contains the core ingredients of a consociative process. The world social process with its consociative elements incorporates innumerable arenas and sub-arenas of interaction. It encapsulates a wide variety of participants whose perspectives are amazingly diverse. These include various symbols of identification; diverse expectations about authority, control and decision; and many demands for access to the shaping and sharing of all desired goods, services, and honors. The situational context of par-

ticipants in this global process of consociation incorporates features of space and time which relate to patterns of psychic stress ranging along a continuum from "normal" to "crisis" level. Participants in the social process will seek bases of power or control from which preferred outcomes may be generated. Base values might include power, wealth, respect, rectitude, skill, well-being, enlightenment, affection, and perhaps, loyalty. These values may also be pursued through institutions based on territorial or other resources serving as bases of power.

The strategies available to participants utilizing various base values, resources and institutions include the diplomatic, the symbolic, the economic, and even the coercive or military. To the extent that participants in this consociative process effectuate value outcomes, further problems for the process will in time result from the production, conservation, distribution, and consumption of values. The time factor forces one to estimate both long and short term results emanating from the specific forms of interaction in the particular arenas of consociation. Results must be predicted in terms of the production and distribution of values serving the common interest of mankind.

An outline of the elements of the social process context of PIL includes the following:

1. Participants

a. Groups

(i) Territorial Communities

- Nation-states
- Federal states
- Protectorates
- Colonies
- Trust territories
- Non-self-governing territories
- Provinces
- Internal states
- Sui generis* territorial communities

(ii) Intergovernmental Organizations

- Universal
- Hemispheric
- Regional
- Functional

(iii) Symbolic Factor Communities

- Racial-Ethnic
- Religious-ideologic
- Traditional-historical (*e.g.*, language identification)

Kinship symbols

- consanguineous kin (symbol-blood ties)
- descent
 - patrilineal symbolism
 - matrilineal symbolism
- clan-sib
 - name symbolism
 - common ancestor symbolism
- phratries (a number of clans—symbol, brotherhood)
- tribes (various authority symbols)

- (iv) **Functional Communities**—Participant interaction heavily emphasizing value realization and best classified in terms of goal orientation.

b. Individuals

- men
- women
- homosexuals
- transvestites
- children (infants, minors)
- transsexuals

2. Values

- Power, *e.g.*, decisionmakers—formal, informal
- Wealth, *e.g.*, business groups, multi-national corporations, etc.
- Rectitude, *e.g.*, church groups
- Respect, *e.g.*, class or caste groupings
- Enlightenment, *e.g.*, scholars groups (APSA, AALS)
- Affection, *e.g.*, affection groups (family)
- Skill, *e.g.*, professional groups (labor unions, American Bar Association)
- Well-being, *e.g.*, nurses, social workers, non-governmental organizations
- Loyalty, *e.g.*, groups with primary and secondary identification as defined by symbols of positive sentiment

3. Perspectives

Perspectives indicate the pattern of identifications, demands, and expectations of participants. Participants in society make demands for values on themselves and others. These demands are conditioned by environmental and predispositional expectations that transcend a single body politic and may involve numerous bodies politic. Perspectives in this arena are best characterized as symbolic events. They may be

refined in terms of identification symbols, demand symbols and expectation symbols.

4. Identifications

Because PIL claims involve multiple "groups," the significance of perspectives of identification to all participants is important. The relevant key forms of identity to the PIL background are as follows:

(a) Primary ego identifications. These identifications are the "I" and "we" identification events.

(b) Self-identification. These occur when the symbols of other egos are included with the primary ego.

(c) Non-self ego symbols. These occur when the symbol events have reference to "other selves" (not-self other).

(d) Attributed identifications.

The importance of complex systems of identification lies in the following datum: Basic patterns of identification invariably involve individuals in a core nexus with a body politic of primary affiliation. Such a nexus invariably establishes a complex relationship between participant and group, involving variable obligations, as well as variable rights and protections sustained by the "group" as a base of power in a "multigroup" process. Another level of the complexity of identification is sustained when the facts of modern life disclose intense patterns of interdependence and interdetermination in the world social process. A salient outcome of the system of identification is that the "same" participant may actually have multiple group identities for different social, political, and economic roles. Finally, a most significant level of complexity of the system of identification is the problem of the relative inclusivity and exclusivity of the perspective. This problem in turn may be substantially conditioned by the moral or normative structure of the social context.

The importance of this latter perspective of identification in the PIL context cannot be gainsaid. Parties make claims about the allocation of prescriptive and applicative competencies on the basis of "who they are," in the broadest sense of these terms. Decisionmakers respond to such claims having to come to terms with their own pattern of identification. The challenges of universalist or, at least, inclusive perspectives of identity and the dangers of parochial, exclusive perspectives of identity are of extraordinary importance to PIL because the problems of PIL, viewed empirically, are ones that involve both the perspectives and the operations of more than a single group or body politic. The nature of the problem requires patterns of identification that are more inclusive. The opportunity to make human rights per-

spectives a component of the system of identification also represents an ongoing challenge.

5. Demands

The demands to which PIL is a response usually involve claims that an indirect or secondary law-making competence be exercised. These demands, when dissected, involve claims about a kind of dual law-making function in decision. Such assertions involve claims to power and to values other than power.

The statement of a demand in PIL includes, for most participants, a demand for transnational recognition and effect. Demand symbols are most often preferences by participants for values in the social process. These values (wealth, affection, rectitude, skill, well-being, respect, enlightenment, and power) may be organized in relation to any phase of the social process (participation, perspectives, situations, bases, strategies, and outcomes). In this process of interaction, each value will be demanded by the "self as a whole" and also on behalf of each "sub-self," such as the "affection group" or "corporate group" or even "political group."

6. Expectations

The contents of consciousness are empirical. The task of the policy-oriented lawyer in the PIL arena is to ascertain as accurately as possible the relevant expectations of key participants in the relevant social process context. The task is, in effect, to explore all salient features of the social process, the constitutive process, and all the protected features of the public order of the multi-state process.

7. Situations

A situation is the arena or zone within which interactions occur. Situations will include arenas that are "organized and unorganized," arenas involving value interaction for shaping and sharing purposes that are either inclusive or exclusive in nature, arenas involving crisis or intercrisis events, as well as their ecological or spatial and temporal dimensions.

a. Ecological or spatial situations

The ecological or spatial dimension involved in PIL has a considerable influence upon the decision-making process in this arena. Events concerning value interaction are located both in "space" and in "time." Since the spatial reach of PIL prescriptions affect the global

consociation process, one can project the total situational context of the PIL decisionmaker as the "world." The relevance of the spatial ecological dimension is reinforced by two further points related to past decision. First, organized territorial entities such as nation states are still of primary importance in PIL. These organized territorial communities acting through their respective elites have principally subscribed, at least in theory, to the concepts of "territorial sovereignty," "legislative jurisdiction," and "vested rights," all of which are generally identified with formalistic positivism. Second, these symbols developed in large part without explicit reliance upon the functional dimension in general or policy realization in particular. Therefore, it is important to keep in perspective the symbolic reference gleaned from spatial features of the situational context (or arena), and the power this symbol has manifested by compelling policy outcomes alleged to be value-free.

b. Institutional arenas

Organized (in varying degrees of territoriality and pluralism). These include various institutional arrangements that operate on a formal level and may or may not be spatially delimited. These specifically include legislative, executive, judicial, and administrative institutions at all levels of the consociation process.

Unorganized (in differing degrees of territoriality and pluralism). These arenas revolve around the multifarious informal practices and procedures of reciprocity and retaliation. Reciprocity refers to the establishment of a relationship of dependence or contingency between parties who are mutually able either to inflict losses upon each other or, through a balancing of interests, to maintain a course which will accrue to the greatest benefit of both. In order to secure stability in their expectations about authority, control, and decision, participants in the PIL process enter into the arena of "unorganized" situations with tacit expectations. These include a recognition of the necessity for mutual tolerance and self-restraint.

c. Temporal dimension

The temporal features of the PIL process of consociation incorporate events that have duration and continuity while other events occupy scattered time frames and may be described as occasional, or infrequent events. It is significant that the power process in the consociation process is neither abstract nor timeless; it is part of the social process in time and the essential reality of time is duration.

d. Crisis level

An important aspect of situations entered into by participants is expectation of crisis. The simplest way to perceive the concept of crisis is to visualize a continuum ranging from low to high expectation of crisis. The intensity of crisis will be contingent upon the scope of institutionalization and organization.

e. Access

Access to arenas are open or compulsory in the PIL context.

8. Outcomes

Outcomes achieved by participants in the process of interaction have an aggregate impact upon shaping and sharing of values in the global arena. It is therefore important to know the extent to which participants are able to secure the important value objectives of power, wealth, skill, affection, enlightenment, well-being, rectitude, and respect within spheres appropriate to the different arenas of interaction, production, conservation, distribution, and consumption of goods and services and related value demands.

9. Effects

In the PIL arena one is concerned with the long term effects on the process of consociation itself, which extends beyond the arena of interaction of the immediate participants. One is concerned with how various bodies politic and communities consociate to promote or constrict the realization of all exclusive and inclusive demands for application and prescription of policy.

C. Process of Claim Relevant to PIL

The process of claim effectually is an outcome of the process of interaction. Here again, specification of claims in PIL may be usefully delineated by the use of relevant aspects of a phase analysis.

1. Claimants

All those who were identified as active participants in the social process outline are potential claimants. What distinguishes a claimant in practical terms, however, is that he seeks, in the manipulation of various power arenas specialized to transgroup decision, a preferred means by which he may optimize his value position. In general, it is possible to clarify further who claimants are by making the distinction

between formal and informal claimants.

a. Formal claimants

Formal claimants are duly constituted officials who both demand and exercise competences necessary and proper for performing a myriad of authority functions over value exchanges which cut across group and state lines. These include executive, juridical, legislative, and administrative actors.

b. Informal claimants

Claims to authority asserted by duly constituted state officials are invariably animated by, among others, individuals, pressure groups, lobbies, and private associations who invoke some kind of decisional response from a formally constituted decisionmaker, whether judicial, administrative, legislative, executive, or diplomatic activity. These parties invariably demand that authoritative decisionmakers themselves assert claims to competency over parties or events and thereby indirectly consolidate or extend their own base values. When one examines the aggregate content of these claims to and through officials made by various parties, one finds that such claims extend the aggregate base values at the disposal of the state or group in whose arenas the various parties are interacting.

2. Perspectives

The demands of parties in PIL usually incorporate a dual aspect. First, the claim involves a claim to power: a claim that a decisionmaker exercise a direct law-making and law-applying competence, or a claim that the decisionmaker defer to the law-making and law-applying competence of another body politic. Second, there is that aspect of the claim that factually incorporates a demand that a particular value allocation be made with respect to the parties involved in the dispute. PIL claims are, therefore, part and parcel of the general claims that state and group actors make with respect to all value categories. The kinds of demands that states and group actors assert can be illustrated as follows:

Power is sought by states in advancing claims to enforce and regulate criminal laws in their territorial base subjecting nationals, domiciliaries, and residents, and in regulation and protection of nationals interacting outside the territorial base, or enforcing criminal prescriptions over aliens injuring the interests of nationals or whose acts affect the security and social

order of the claimant state.

Wealth is a goal in claims of states to control events which affect their fiscal integrity, to control dispositions of property situated within their territorial base or owned and controlled by domiciliaries and nationals, to control the making and performance of agreements, and to regulate and control business activities.

Well-being is a fundamental goal in claims to control the effects of acts interfering with the health of nationals or domiciliaries, etc.

Respect is involved in claims to secure protection against official discrimination, to secure recognition and respect of judicial and legislative acts of state, to obtain jurisdictional immunity, to control solemnities and forms traditionally prescribed for the consummation of particular legal relations, etc.

Skill is sought in claims to control, regulate, or restrict professional activities, and in authority to prescribe the effects and consequences of infractions of regulations or other unskillful operations.

Affection (solidarity) is at stake in claims to control the activities of members of a social group, in claims designed to create a broader focus of identification between persons and a social group and to control the effects of the activities of such persons either permanently or temporarily.

Rectitude is demanded in claims for authority to prescribe and apply policies in accordance with idiosyncratic concepts of justice, fairness, due process, and the like, or to protect unique conceptions of individual responsibility or transcendental belief.⁴⁵⁴

The ostensible or manifest claimants to authority in PIL are the state or the group. Less formally, and perhaps more realistically, various organized or unorganized power holders demand that their state or group representatives assert claims to authority, in a transgroup context, in order to protect and, perhaps, extend both their private as well as community interests to which the "privately" asserted interests have some relation in the aggregate. To the extent that state actors are claimants, the above-quoted general value categories provide a useful specification of the areas over which states will assert competencies to apply and prescribe policy. These areas include the making and appli-

454. See generally M. McDougal, H. Lasswell & L. Chen, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980).

cation of law to specific conflicts about transgroup allocation of values. From this perspective, the nature of the PIL claim (whether the claimants be "formal" or "informal" actors) will invariably include a claim to power, and often such claim to power will effectually be used, as may some other value, as a base for realizing an in-fact value indulgence other than power. The main claims include:

- (i) claims relating to power;
- (ii) claims relating to agreements, exchanges, and deprivations with respect to all values;
- (iii) claims relating to associations seeking scope values other than power (primarily);
- (iv) claims relating to family relations; and
- (v) claims relating to the control and management of resources.

The basic paradigm of PIL claims include assertions of prescriptive and applicative competence. These claims involve demands as to both primary and secondary assertions of competence. A primary assertion of competence refers to a direct law-making and law-applying competence; a secondary assertion of competence refers to an indirect assertion of competence. As indicated, by prescription one refers to a law-making competence to project and establish policy. By application, one refers to the resolution of a specific dispute with respect to the relevant basic community policies and comprehensive complementary standards to secure the in-fact capacity for reasonable adjudication.

3. Specific Claims

a. Claims for competence to prescribe policy (primary and secondary)

Some of the unique features of the competence to prescribe policy in PIL have been outlined above. As suggested, various bodies politic and groups have made, and continue to make, within the course of the process of consociation, demands about people, values, or events that are connected, or have a "significant relationship" or "center of gravity" with that group. Such factors primarily affect the spatial parameters of particular groups, substantially affecting the groups' value processes. In this context, "spatial" takes on a psycho-social, rather than a rigidly territorial character. A detailed specification of claims would involve the development of essential contextual features of any specific value-process: the wealth process, the affection process and so forth. Hence, if one were dealing with domestic relations (affection process) in the PIL context, one would be concerned with claims for the allocation of prescriptive competencies over all relevant phases of that process; in other words, claims where the parties demand access to the

shaping and sharing of the values of affection (affection demanded as a scope or desired value).

For example, the affection process allocates prescriptive competencies regarding all significant phases of the social process where affection is sought as the scope or desired value and where its lawful characterization might be demanded as a precondition, or base, for the accretion of affection across group lines or as a scope value and as a base for the realization of all other demanded values. Such values might include: inheritance, immigration, naturalization, wrongful death, legitimacy, worker's compensation, social security, tax benefits, and immunity from prosecution policies. Essentially, claims in PIL are made with respect to every phase of every value process. Claims relating to any phase of the affection process may be made with reference to the following:

1. participants
2. perspectives
3. base values
4. strategies
5. situations
6. outcomes
7. effects.

The same may be illustrated at ever increasing levels of microdetail through every other phase of every value process: power, wealth, enlightenment, skill, well-being, respect, and rectitude.

b. Claims to competence for primary application

Claims to apply usually arise from the intense degree of effective power over the parties or the subject matter at issue or both. For example, the claim to "judicial jurisdiction" is exercised *in posse* or *in esse* by representatives of the activated group or state. Contrary assertions refer to the absence of control or the absence of an adequate authority base for the application function, *e.g.*, an absence of a minimum contact; absence of notification and lack of mutual convenience; or absence of rectitude due process values.

These claims are often misleadingly designated as claims relating to adjudicatory competence or judicial jurisdiction. The designation is clearly underinclusive. Such claims traditionally involve a high degree of control over the person, thing, or subject matter and have been encapsulated in the Latin symbols *in personam*, *in rem*, and the hybrid formulation *quasi-in-rem*. The origins of these competencies appear to have been associated with the exercise of effective control over parties or subject matter, whether this be exercised *in posse* or *in esse* by the

chief actors of the concerned body politic or group. These assertions, especially in the light of the minimum contacts doctrine promulgated in *International Shoe Co. v. Washington*,⁴⁵⁵ and the merely symbolic exercise of transgroup control (the summons) have tended to accentuate such factors as due process⁴⁵⁶ to the litigants, and the feasibility and reasonableness of the forum in discharging expeditiously the decision-making function—*forum non conveniens*. In America particularly, the trend in decision has been to move away from the symbolic power inferences incorporated in *Pennoyer v. Neff*,⁴⁵⁷ to a more functional allocation of applicative competencies among the various states with high deference given to the rectitude value.⁴⁵⁸ This trend has been accentuated by the development of the so-called “long-arm” statutes whose only limitation seems to be contained in a kind of functional rationality evidenced in convenience factors, and by the fairness demands contained in the mandate of the due process clause of the fourteenth amendment. How far these shifts from “control” to “authority” will be diffused into the global arena is difficult to estimate. The intensified interactions by individuals and associations on a global scale, however, serve to reinforce such developments and might result in a pattern of claim assertion along essentially functional, rather than formal lines.

c. Claims to competence for secondary application

These claims are lodged with decisionmakers asking that deference be given to the acts of another group which shared a competence over the parties or subject matter. These claims make reference to:

1. judicial and arbitral awards, i.e., the recognition of foreign judgments and awards, decrees, etc.;

455. 326 U.S. 310 (1945).

456. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In this case the Supreme Court examined the sufficiency of notice by publication to the beneficiaries of a common trust. The Court found that such notice was adequate as to those beneficiaries whose names and addresses were unknown to the trustee, since this was the most practicable and effective method under the circumstances. In contrast, however, the Court found that in regard to those beneficiaries who were known to the trustee, notification by publication was insufficient under the fourteenth amendment. It was found that since substantial property rights were involved, the fourteenth amendment required personal mailings to the beneficiaries in this category.

457. 95 U.S. 714 (1877). The *Pennoyer* court spoke in terms of territoriality, placing great symbolic significance in the physical presence of a defendant within the jurisdiction of the court in which the suit was brought. See *id.* at 722-23.

458. See *supra* text accompanying notes 179 & 281.

2. executive acts (act of state); and
3. legislative acts.

D. Process of Authoritative Decision in PIL

The PIL context of interaction incorporates a world process of authoritative decision. The purpose of this process of effective power is to resolve PIL claims and counterclaims for perhaps exclusive or inclusive prescription or associated with human rights perspectives as evidenced in various conventions, declarations, and other instruments codifying human dignity, in situations where the facts or events are related to more than a single group or single body politic.

The process of authoritative decision in PIL may be described as follows: Relevant decision-making participants, using bases of power appropriate to the structure of decision, implement the objectives of various communities and use diverse strategies or instruments of policy to arrive at outcomes in the context of specific claims to the allocation of competencies in the prescription and application of policy. This has important effects for the participants (claimants) in terms of their access to indulgences or deprivations, for the respective communities with which they share a significant connection, and for the total arena of which these participants are a part. This all occurs within the framework of changing conditions of contemporary social and power processes within a global PIL process of consociation.

1. Participants

Decisionmakers at all levels of the power process include, *inter alia*: judges, administrators (local, national, transnational), lawyers, diplomats, arbitrators, legislators, multi-national business executives, private associations, parties, pressure groups, and religious and ideological purveyors of rectitude symbols.

2. Objectives

The objectives of the power process are as follows:

- a. to facilitate the optimum shaping and sharing of demanded values and to harmonize such demands with inclusive prescription of connected communities, as these approach shared expectations about human dignity.
- b. (i) to promote commonality of interests of all participants, including exclusive and inclusive competence for control over value shaping and sharing.
(ii) to optimize claims reflecting common interests and to minimize claims reflecting special interests.

c. to balance common interests of different but connected bodies politic where such interests are divergent, as they relate to functional competence, irrespective of whether these common interests are of an exclusive or an inclusive character, with a preference for the values that most closely approximate the human dignity postulate.

3. Perspectives

a. Identifications

In transnational arenas, identification symbols will vary in scope and intensity from culture to culture, class to class, and individual to individual. The range of identifications with the self and whatever the self includes or excludes, incorporates national or community symbols as well as transnational symbols cutting across "national," "tribal," or neoexclusivist community lines, to include identification with classes; with symbols of ideological-religious identification, such as socialism, capitalism, Judaism, Islam, Christianity, etc.; and with professional and skill associations, etc. Symbols of parochialism attendant on nationalism or symbols which transcend national loyalty and provincialism have always proliferated in the arena of PIL consociation. Symbols of a national *weltanschauung* on the one hand, and symbols of a type of Romanistic Canonical universalism on the other, are good indices of the way expectations about authority and control have influenced decisionmakers. To the extent that judges are visible instruments of the codification of customary expectations in PIL, the transmission of skill and other values attendant upon the judicial role may accelerate a less parochial outlook in decisionmakers in this arena. But the facts of contemporary life are contradictory. There is evidence of trends that seem to accelerate a functional homogeneity in theory and practice because of increasing interdependence and interdetermination. Yet the trend to a pluralistic, diverse and sometimes parochial syndrome, is also apparent. In addition, recruitment to the structures of decision tends to reflect class and culture patterns, the similarity of which appears to transcend national boundaries. Examples include such institutions as the Yale or Harvard Law School graduate program, the School of Oriental and African Studies (London) and many others of varying complexity and variety.

b. Demands

Basic demands in this process include:

(i) maintenance of structures which facilitate value exchange among various bodies politic; and

(ii) facilitating maximum value shaping and sharing between various groups and bodies politic in the world arena.

c. Expectations

Decisionmakers in this arena promote, through decision, continuing shared expectations about stability and change. Expectations about stability include accomodation of value indulgences or deprivations upon the basis of reciprocity, deference, and mutual tolerance. The purpose of this accomodation is: (1) to establish a global equilibrium in value exchange; (2) to effectuate change where such change is essential to the retention of equilibrium; and (3) to avoid disequilibrium inconsistent with the postulates of a preferred public order. Decisionmakers have, in past practice, given deference to the minimum order expectations of all affected bodies politic as, indeed, they have attempted to optimize value realization in accord with expectations of participants and values attendant upon human dignity.

These outcomes have often been achieved because concerned decisionmakers and scholars have had a very subtle, and sometimes quite sophisticated, though rather inarticulate, sense of the possible limits of decision controls transcending discrete groups. Indeed, the most significant contribution that past decision has provided is a quite stable pattern of aggregate expectations incorporating the minimum order dimension where *brutum fulmen*⁴⁵⁹ is rarely resorted to. The stabilized global pattern of minimum order expectations has and continues to provide a great many theorists and decisionmakers with a deep sense of a unifying universality.

4. Situations

Situational value context bears importance for the PIL frame. Here is provided, in outline form, the kinds of value-situational contexts relevant to this perspective:

a. Institutional arenas

- legislative
- executive
- administrative
- judicial
- diplomatic
- paradiplomatic

459. *Brutum fulmen* is a judgment void upon its face, which is in effect no judgment at all, and by which no rights are vested, and from which none can be obtained. *Dollert v. Pratt-Hewitt Oil Corp.*, 179 S.W.2d 346, 348 (Tex. Civ. App. 1944).

b. Spatial arenas

Spatial arenas include those prescribed by the relational context of the social process and the psycho-social limits that define these situations.

c. Temporal arenas

PIL involves a process of decision transcending discrete groups that are spatially and temporally delimited. The intertemporal aspects are complex, varied and no less real in the day to day business of making and applying law. Under the situations aspect of a phase analysis, the arenas one is concerned with are those having a duration through time, *i.e.*, those that are *continuous*. One cannot, however, exclude the arenas where a high degree of voluntarism is extant, and where occasional ad hoc arenas are framed by and for the manipulation of the time artifact.

d. Arenas for crises events

The acid test of any decision-making apparatus is whether and how it responds to crises events. When the cross-cultural aspects of a PIL problem assume a crisis dimension, the responsibility for the amelioration of cross-group confrontations is important. Here the PIL decisionmaker is uniquely located to sustain and enhance the public order. The kinds of crises arenas that are creatively structured to handle a claim relating to any phase of a value process having an urgent character are of fundamental importance in stabilizing expectations about control and authority across group and state lines.

e. Access to arenas

Access to arenas is often variable when one moves from one politically organized group to another. Access may be relatively open to foreigners and nationals or relatively restricted and closed.

5. Base Values

a. Authority as a Base Value

Earlier it was shown how decision-making in different phases of the PIL process was involved in the manipulation of the operative symbology of power (control) and authority.

Traditionally, at least in the context of Euro-centric PIL, the confluence of Roman law, Canonical Universalism, and common scholars' language served to create and sustain a quite inclusive paradigm under

the rubric of the universality of Christendom. More exclusive symbols of authority that emerged coterminously with the nation-state system sustained much of the more inclusive symbology by the ascription of a fictional consent theory attributable to their "sovereign" community systems. What is and remains significant, however, is the extraordinary deference decisionmakers have manifestly accorded the latinized symbols in PIL decision, and just how powerfully decisionmakers have from time to time manipulated these symbols to achieve what were deemed in context to be desirable outcomes.

b. Control

Territorialism is still an important base of power in PIL and an important factor in the allocation of values across group lines. Recent trends in the global system of power relations have tended to replace static territorialistic power conceptions where events and their projected impacts *de futuro* involve other aggregates of power. The necessity for what Mr. Kissinger calls contingency analysis⁴⁶⁰ is becoming more a reality for those charged with decision capacities in PIL.

c. Rectitude as a power base

In the past, rectitude has been used as a power base where elites and mid-elites were able to preempt all the symbols of moral rectitude to facilitate the movement of goods and peoples across group lines and protect the "foreigner" in such value exchanges. Rectitude symbols have been used to further both parochialism and universalism, and even aberrant versions of universalism became associated with the worst aspects of colonialism. The protection of aboriginal natives often meant, in practice, their extermination and symbols such as the "white man's burden" were sometimes understood to literally imply an undue burden. The rectitude symbols should not be ignored as they can be used for good or ill. Lawyers adept at symbol manipulation and committed to the goals of a public order of human dignity should find them a useful tool for structuring the global social process in desirable ways.

6. Strategies

The policy-sciences have isolated four principal strategems most commonly evidenced in the context of transgroup public order interactions. These are as follows:

460. See generally *supra* note 354.

- a. The Ideological Instrument. This has been a primary base of authority in PIL, especially the religious-inspired symbols evidenced in the ecclesiastical and canonical courts. Modern secular ideologies have projected ideological symbols of variable significance and impacts to the attention of decisionmakers.
- b. Diplomatic Instrument. Diplomacy and negotiation still represent one of the most frequently resorted to instruments for allocating values in the PIL frame.
- c. Economic and d. Military Instruments.

These strategies have been a stimulus toward according high tolerances to alien perspectives. The potentialities inherent in both of these instruments are important factors in sustaining expectations of reciprocity and deference as a primary expectation of transgroup behavior.

7. Outcomes (Decision Functions)

The outcomes of PIL decision involve all value processes having a transgroup aspect.⁴⁶¹ PIL outcomes deal with the allocation of values across state and group lines; they sustain or create regimes that directly and indirectly bear upon the allocation of values globally, regionally, and locally; they create and reinforce expectations about the PIL decision process. The central outcomes of the decision process are, of course, the decision functions themselves. These include intelligence, promotion, prescription, application, invocation, termination, and appraisal. Special emphasis is given to intelligence, promotion, and prescription.

a. Intelligence

The recent developments in PIL away from the formalistic perspective have underscored the importance of comparative data about all value processes that can be integrated into an essentially cross-cultural decision arena. These outcomes have also been influenced by re-

461. The outcomes of the process of prescription of PIL involve a rich variety of sources, including governmental and non-governmental actors and transnational organizations. The private law-making process includes not only the actions of domestic tribunals, but also the formulation of specialized codes to control transnational activities. For an illustration of the documentary sources that deal with the economic aspects of both public and private international law, see Seidl-Hohenveldern, *International Economic "Soft Law,"* in *RECUEIL DES COURS* (Collected Courses of the Hague Academy of International Law, vol.2, 1979). Other sources of PIL include the proceedings and conferences of the Hague Conference on Private International Law. Additionally, documentary sources dealing with international law and international human rights also have a bearing on the private international law-making enterprise.

gional, hemispheric, and global human rights developments and the peremptory character of these standards for transgroup decision. In short, there is emerging an enormous output of work of a comparative and cross-group character that is of specific relevance to the crystallization of preferred inclusive policies of a peremptory character. While these outcomes are not systematically coordinated, they provide an impressive corpus of intelligence that has perforce to make its way into the structure of PIL decision, if rationality remains an important goal of practical decision-making.

b. Promotion

The development of inclusive standards for PIL, especially the human rights aspect, is a fundamentally important component of decision. Therefore, the explicit recognition and articulation of human rights prescription in the structure of a PIL decision has a significantly important promotional aspect. It promotes human rights by making such prescription the sustaining basis and goal of decision. Such outcomes often serve as the trigger for less formalized pressure groups and variously organized actors to legitimize their agitation for social change in the direction of human rights perspectives.

c. Prescription

The prescribing function plays a quite complex role within the structure of a PIL decision.⁴⁶² The authority component of the prescribing function has often demanded that reference be made to inclusive standards. Specifically, prescription here would include reference to: (1) comparative, substantive prescription, including diverse perspectives about custom; (2) decision practices, *i.e.*, judicial, administrative, and diplomatic practices of private decision in arenas of private autonomy; (3) peremptory international law (conventions or customary); and (4) scholarly dissertations.

8. Effects

a. Long term public order considerations.

462. Take, for example, the prescribing function relating to the international economic order. It is obvious that the prescribing process in the sphere of economic regulation is in a great state of flux and development. Whether one wishes to designate contentious economic expectations as "soft" law, and less contentious expectations as "hard" law, is not so crucial as the recognition that the relationship between these ideas represents a dynamic "prescriptive" process of substantial importance to PIL. See Seidl-Hohenveldern, *supra* note 461.

b. Immediate changes in the value situation of participants and how this affects the aggregate value of connected communities and the broader community in the short and long term.

9. Factors Affecting a Decisionmaker in the Process of Consociation

- a. Problems transcend prescription of body politic.
- b. Problems are multi-cultural and demand multiple and inclusive identifications.
- c. Role expectation and change and the complexities dependent upon this for transgroup decision.
- d. Problems of transgroup prescription and effects.
- e. Problems of: (i) culture (xenophobia, parochialism); (ii) class (social stratification); (iii) personality (predisposition, environmental); (iv) interest (role perception).

These factors also incorporate such things as the past experiences of the decisionmaker, *e.g.*, his experiences with democracy or totalitarianism, his experiences with colonialism or its opposite, his experiences with capitalism or socialism or the "middle way" (the welfare state). These experiences may, for example, reflect the degree to which he embraces voluntaristic or coercive practices and may reflect further upon the degree to which he optimizes his personal indices of capability.

E. Basic Policies of PIL

Earlier in this study, it was maintained that PIL and public international law were indispensable and complementary aspects of a larger, more inclusive world process of authoritative decision. This conclusion has important consequences for the classification of basic public order priorities of the world community.⁴⁶³ Goal clarification is, of course, a

463. Viewed in the light of traditional and contemporary expectations, the basic policy objectives of the choice of law process would seem to require that prescriptions (rules, principles, standards or methods) clarify and "possibly" advance the policies, purposes, and values underlying the particular problem that the court or other decision-specialist is called upon to decide. In the context of the court system, other objectives have been articulated as requiring integration into the decision process. Thus, the choice of law principle or methodology must allow the forum the reality, or at least the appearance of altruism. The principles or methodologies must also ensure that the forum is not parochial or chauvinistic, or stated more positively, the prescription must account for reciprocal tolerances. The avowedly traditional concerns of "justice" are also deemed important objectives for a choice of law principle or method. These traditional concerns include the need for uniformity of result regardless of who the decisionmaker or the parties are; that the application of these prescriptions should be made simple rather than complex; and finally, that the administration of the system should be cost effective. *See* von Mehren,

significant and vitally important intellectual function in PIL as it is in other areas of authoritative decision.⁴⁶⁴ The scholar's contribution can

Recent Trends in Choice of Law Methodology, 60 CORNELL L. REV. 927, 946 (1975). Compare Rosenberg, *Comments on Reich v. Purcell*, 15 UCLA L. REV. 641 (1968); Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972).

For a general orientation to the problems of objectivity and subjectivity in social sciences, see generally, G. MYRDAL, *OBJECTIVITY IN SOCIAL RESEARCH* 48-49 (1969); J. SHKLAR, *LEGALISM* (1948); Gouldner, *Anti-Minotaur: The Myth of Value-Free Sociology*, 9 SOCIAL PROBLEMS 199 (1962). On the problems of the "is" and the "ought", see D. HUME, *A TREATISE ON HUMAN NATURE* (1777).

464. See H. BATIFFOL, *ASPECTS PHILOSOPHIQUES DU DROIT INTERNATIONAL PRIVÉ* (1956). Batiffol views PIL as an aspect of national law, but the goals of the field are designed to coordinate the conflicts of concerned jurisdictions with reference to "natural law, social facts and doctrinal concepts of the ends of justice as defined by individual, national and international values." Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 724 (1957). Professor Yntema summarizes the historically articulated objectives of PIL as follows:

[U]niformity of legal consequences, minimization of conflict of laws, predictability of legal consequences, validation of transactions, relative significance of contracts, recognition of the "stronger" law, cooperation among states, respect for interests of other states, justice of the end results, respect for policies of domestic law, internal harmony of the substantive rules to be applied, location or nature of the transaction, private utility, homogeneity of national law, ultimate recourse to the *lex fori*, and the like

Id. at 734-35. Yntema continued:

Instead of attempting to consider all these formulations in detail, it is suggested that the central policy considerations peculiar to conflicts law can be subsumed under two heads: *security*, which is the first principle of utility in Bentham's and most other schemes of legislation, and *comparative justice* of the end result, namely, its consonance with the results of comparative research, an objective that derives from the basically equitable purpose of conflicts law to individualize the treatment of foreign cases. These are obviously intermediate standards, the purpose of which is to ensure effective realization of more basic human interests and values in conflicts situations.

Id. at 735. Professor Yntema sees implicit in the conditions of power in a multistate system the PIL objective of security as one of the chief goals of the system. He explains the needs for security as follows:

The principle or policy of security is simply that, so far as possible and proper, a given situation should have equal legal treatment everywhere. Security in law has two faces: on the one hand, it implies the rule of law, or in other words the orderly settlement of disputes in accordance with general rules; on the other hand, it implies equality in the application of the rules so that the same case will receive the same treatment everywhere. For the purposes of conflicts law, the objective of security seeks to maximize conformity in defining the legal and socioeconomic consequences of transactions and events by the selection and application of the corresponding law. Looked at from a jurisdictional viewpoint, which it may be repeated is in a degree fictional in the present context, the principle implies reciprocity and respect for the interests of the states concerned; in particular, it requires deference to the effective law, namely, that of the state which is in position to control. Without such cooperation in regard to

be important in influencing the character of the public order in terms of its approximation to human rights standards. The three key questions that suggest themselves in this context are as follows: For whom is goal clarification undertaken; what primary identifications animate the clarifier; what identifications ought to animate the clarifier's perspective?

PIL goal clarification is directed at the audience whose value exchanges cut across state and group lines; the target audience is mankind. The scholar is both observer and part of this target audience. He clarifies policy on behalf of himself and others as part of the world community. His recommended identifications are with the whole of mankind and, more specifically, with the common interests of the global whole.

These common interests are distinguished from special interests, and it is recommended that identification with special interests be rejected in favor of the common interest in a shared public order of human dignity. Common interests may be usefully divided between inclusive and exclusive interests, as these concepts, in turn, relate to op-

the policies the respective states enforce, there will be anarchy in the choice of law instead of the certainty business and commerce demand. Looked at from the viewpoint of the individuals affected, regularity in the application of law is needed to ensure the protection of their just interests and to enable them to anticipate the consequences of their conduct, so that they can plan their affairs accordingly. In specific areas of legal regulation where security is especially important, for example, with respect to commercial instruments, legal rates of interest on loans, marriage contracts, the form of testamentary dispositions, and the validity of trusts, special techniques have been developed by reference to the more favourable law to ensure validation of transactions. In sum, the first purpose of conflicts law, as of all law, is to introduce order, or at least that minimum which is necessary if basic human values are not to be unduly sacrificed or subjected to discrimination.

Id. at 735-36. The complement to the importance of the system of PIL meeting the goals of "security," are the concerns of "comparative justice," according to Professor Yntema. The nature of comparative justice is explained as follows:

As has been indicated, the attainment of security as a conflicts policy supposes that the conflicts rules administered in the different legal systems under consideration should be sufficiently ascertained. This is by no means universally true, since the cases are sporadic and new problems constantly arise. Moreover, the elaboration of law through judicial legislation is a slow process, which frequently hovers for some time between competing theories. Meanwhile, with changes in conditions of life or in the evolution of legal doctrine, the old solutions may become inappropriate or their over-technical application may produce harsh results. In such situations, *comparative justice* in the individual decision, by which is meant consideration of the desirable result as indicated by comparative study of the underlying policies of the domestic substantive laws, suggests itself as a criterion for the solution of conflicts cases.

Id. at 737.

timum and minimum order priorities.

The clarification of basic community policy in PIL in terms of inclusive interests (optimum and minimum order) and exclusive interests (optimum and minimum order) places greater emphasis on value interactions that presuppose a framework of, at least, minimum public order. The emphasis of the PIL paradigm is not that of basic security and the control of unauthorized violence. For example, it is difficult, if not fanciful, to assume that a contemporary feminine "face" could, like Helen of Troy, launch a thousand ships. Hence, it is unlikely that claims, for instance, relating to the affection process and decisional responses thereto, might trench upon the maintenance of the transgroup inclusive interest in maintaining minimum order. Yet minimum order is the essential precondition for value exchanges to occur across state lines. The broad inclusive goals of PIL from the policy-science point of view follow.

1. Criteria for Guiding Choice in Comprehensive Policy-Centered PIL

One of the great traditional tasks of jurisprudence has been the clarification and implementation of what theorists have seen as the common interest.⁴⁶⁵ Often what passed for the common interest was merely the rationalization of the interests of the predominant group, or elite or class. Still, the concern that law secure and promote the common interest remains a major theme of contemporary theory of or about law.⁴⁶⁶

The jurisprudence of the policy-sciences sees as a key normative dimension of law the explicit clarification and use of the common interest. It is thought that the perspective of the observer lends clarity of perspective to the articulation of the common interest. It is also thought that the ambiguity of roles in the observer as citizen adds the dimension of empathy and identification with man in society and to the common interest, as secured outcomes of social process. No ob-

465. The concept of common interests comes close to that of the public interest. For an informative discussion of the concept of the public interest in its many dimensions, see especially the essay by Lasswell, *The Public Interest: Proposing Principles of Content and Procedure*, in *THE PUBLIC INTEREST* (C. Friedrich ed. 1962). For an explanation of the concept of common interest, see M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 444, at 408-15.

466. Theorists as diverse as J. MARITAIN, *MAN AND THE STATE* (1951); L. FULLER, *THE MORALITY OF LAW* (1969); H. HART, *THE CONCEPT OF LAW* (1962); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); R. POUND, *OUTLINES OF JURISPRUDENCE* (5th ed. 1943); P. SELZNICK, *THE SOCIOLOGY OF LAW* (1959); J. STONE, *LAW AND SOCIAL SCIENCE* (1966); H. HART & A. SACHS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958); M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 444.

server, no matter how detached, is insulated from social processes or from processes that interstimulate relationships between social actors. The key then is for the observer to be both detached and responsible for his own conduct as a seeker of illumination for himself and others. The natural law tradition and similar traditions have accorded guidance to the extent to which an observer-participant might identify with humankind in the aggregate (if indeed one has the moral and psychological power to do so). Policy-scientists contend that the content of the common interest must start with the condition and dignity of man.⁴⁶⁷ The common interest postulated by the policy scientist is that the realization of human dignity is included in a recommended pattern of identification which is optimally inclusive of the self and all "others" (mankind as a whole).⁴⁶⁸ Viewed in this perspective, all matters of choice affect the common interest and the human dignity this implies.

Throughout life, man is confronted by the inevitability of choice. Some choices are good, others are bad. All choices allocate values—desired goods, desired services, or deserved honors. Politics and law are concerned with choice and decision; they are concerned with what is loosely styled the authoritative allocation of values, including the value of power itself. For a theorist committed to a common interest in human dignity, there is the recognition that all decisions allocate weal and woe. Hence, the concern arises that the allocation of values be as consonant with the common interest in human rights as possible. Viewed in this broad perspective, the potential for a truly functional, problem-oriented, contextual, multi-disciplinary, goal-guided PIL is enormous. A key task on the agenda of a new orientation to PIL is to clarify the concept of common interest in terms of functional categories that enable one to ground broadly based abstractions in concrete realities. The reference to the common interest here is meant to differentiate it from the notion of special interests. The assumption is that special interests serve to promote human dignity for the few rather than the many. It is, however, a characteristic of practical politics that actors try to preempt the symbols of common interests while the content and process of the perspective remains committed to the orbit of special interest concerns. One of the great challenges in clarifying the objectives of PIL is to adequately address the question of which asserted interests are consonant with special interests and which are consonant with common interests. A decisionmaker should seek to invariably honor asserted interests that are common rather than special interests.

467. See generally M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 444.

468. *Id.*

a. Functional categories of common interest in PIL

The common interest can conveniently be divided into those interests shared by all of the communities of the world and those which are not.⁴⁶⁹ For convenience, these are labeled inclusive interests and exclusive interests. Exclusive interests tend to be peculiar to particular societies or bodies politic. The inclusive and exclusive interests can be further divided in terms of the different aspects of the public order to which they refer. These are concepts of optimal order and minimum order. From the perspective of comparative justice and human rights, the inclusive interest in maintaining the conditions of peace and security (minimum order) and securing the greatest shaping and sharing of all demanded values (optimal order in the world community) is ultimately a goal shared by both so-called public and private international law. It is the sphere of optimal order, however, that has traditionally been the goal of PIL.

If an outsider were to view the prescriptive outcomes of the international legal process, he would identify functionally defined aspects of behavior in terms of codes of conduct. Prescriptions involving largely private motives may be designated as supervisory codes. Prescriptions involving community intervention to retain equilibrium may be designated the regulative code. Prescriptions covering police power and other state functions may be designated the enterprisory code. Prescriptions that establish institutions of power and decision are called the constitutive code. Prescriptions that seek to control and regulate what is loosely called criminal behavior are called the corrective code.⁴⁷⁰ It is particularly with prescriptions dealing mainly, though not exclusively, with supervisory, regulatory and constitutive codes, that form the prescriptive basis of PIL. The central concern is that these formal and informal prescriptive codes be made more consonant with standards envisioned in the clarification of the policies of a public order of human dignity in practical circumstances.

PIL is a branch of law that challenges the capacity to clarify abstract conceptions of justice—optimum order—and ground these abstractions in practical litigation contexts. What criteria might be invoked to assist in this enterprise?

b. The accomodation of interests in PIL

A truly functional PIL must inevitably come to terms with John Dewey's controversial thesis that valuation can and indeed must be, for

469. *Id.* at 409-10.

470. R. ARENS & H. LASSWELL, IN DEFENSE OF PUBLIC ORDER 218-36 (1953).

social purposes, an empirical process, and in this sense, ethics has a "scientific" side to it.⁴⁷¹ The idea of grounding value judgments is historically embedded in the technique of law. Take a simple example to illustrate the point. A normative proposition such as, "one may not profit from one's inequity," may in "grounded" terms mean a murderer cannot inherit from the estate of his victim. How the abstraction is "grounded" in the specific instances is a technique embedded in the craft-skills and folklore of lawyering. Yet as problems become more diffuse and the normative standards that are to guide conduct more opaque, the relevance of articulated criteria to guide the grounding of choice in the common interest becomes a crucial task for the legal theorist. Professors McDougal, Lasswell and Chen have stated the issue precisely in the human rights context: "The basic challenge is to make *continual reference of the part to the whole* in a contextual consideration of every particular question in the light of overriding goals and characteristics of the larger community."⁴⁷²

This task is particularly relevant to modern PIL. Theorists operating from widely disparate perspectives have suggested that PIL be tempered by concerns for comparative justice, for deference to principles of preference, for restrained and enlightened prescription, and for decisions to be made on the principle of comparative impairment. In addition, decisions should approximate reasonable expectations of litigants and communities through the sense of altruism.

The outcomes of PIL ought to be evaluated and defined by functional consequences with concerns for the potential of PIL to secure, in particular instances, the vindication of the better rule of enlightened justice, and for the recent emergence of perspectives that seek to condition PIL by the vindication of multi-state law, multi-state rules, and multi-state conceptions of justice. Finally, the emerging perspective should secure in a methodologically disciplined way, a local to global focus. These perspectives seek the prescription and application of international standards of justice to the system of international law. They also seek a doctrinally secure profile for the individual and the private association in the multi-state, transnational, legal environment. In short, these perspectives seek to deparochialize PIL as never before and to insure that inclusive policies associated with the public order of human dignity will be a central component of the perspective and techniques of PIL. These above perspectives implicitly acknowledge in

471. See J. DEWEY, *THEORY OF VALUATION: INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCES* (1939). See also E. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 495-500 (1953).

472. M. McDOUGAL, H. LASSWELL & L. CHEN, *supra* note 444, at 415.

different ways and with different emphases that intellectually coherent procedures be invented to assist in the determination of what the common interest is and to make the prescription of the common interest applicable to particular instances. The following three salient intellectual tools may be used to lend assistance in this enterprise.

c. Ascertaining community expectation in specific prescriptions

Traditionally, the rules of PIL appeared in large measure as devices for distilling community expectations in particular contexts. The confusion appeared to have three principal aspects. First, the rules became so formalized and abstracted from reality that honoring expectations about control in a multi-state setting became extremely unrealistic. Second, expectations about the authority content of the rules were undermined when it was shown that quite often the consequence of rule application involved obvious patterns of unfair surprise and anachronism. The third major flaw with the traditional view was its tendency to obscure the content of prescription. It has been acknowledged that the traditional view was blindly committed to jurisdiction selection without regard to the content of prescription.⁴⁷³ Again, such process served to insulate PIL from clarifying the content of prescription in terms of community expectations that the prescription is meant to incorporate.

Modern PIL analysis has sought to displace the traditional transstate rules and perspectives because of their normative ambiguity and incompleteness. The focus of modern analysis has been keyed more to the content of prescription and less to the expectations regarding control and authority in a multi-state setting. While this represents a technical advance on what had gone before, the system retains the fundamental problem of ascertaining community expectations in a multi-state setting. What must be brought to bear, methodologically, on the process is the acknowledgement, in functional analysis, that prescription is a process of communication, and that "[t]he adequate performance of this task demands a disciplined, systematic survey and assessment of all features of the process of communication and its context which may affect expectation."⁴⁷⁴

473. See *supra* notes 68-73 and accompanying text.

474. M. McDougal, H. Lasswell & W. Reisman, *The Prescribing Function* 20 (May 3, 1974) (unpublished manuscript available in office of New York Law School Journal of International and Comparative Law).

d. Supplementing of prescriptions and community expectations

Perhaps more than in any other area of law, PIL is replete with incomplete and ambiguous rules, principles, and other forms of communication. In this sense it shares with other areas of law, though perhaps in an acute form, the inevitability of the legal vacuum—the gaps, ambiguities, open-endedness and penumbras of uncertainty of the legal precept. The idea of supplementing such ambiguity has, of course, been part of the major intellectual contribution of modern American conflicts thinking. For example, there is Professor Yntema's concern with the vindication of principles of comparative justice in this field;⁴⁷⁵ or Professor Currie's concern that in cases of true conflict a court should exercise a more restrained and enlightened perspective on its own impulse to parochialism.⁴⁷⁶ Justice Traynor has provided a complex mode of analysis linking altruism with the reconstruction of rational community expectations in a multi-state setting.⁴⁷⁷ Similarly,

475. See, e.g., Yntema, *The Historic Basis of Private International Law*, 2 AM. J. COMP. L. 297 (1953); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1927).

476. See, e.g., B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

477. See, e.g., Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845 (1961); Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959). But see Rosenberg, *Comments on Reich v. Purcell*, 15 UCLA L. REV. 644 (1968) on the problem of clarifying the normative basis of PIL. Professor Rosenberg correctly sees a tension between the principle of reciprocal tolerances and the concern for justice in the instant case. But the pitfalls of not seeing the significance of the double law-making function in the choice of law process is apparent in his criticism of the policy-centered theories of writers influenced by Brainerd Currie. Rosenberg's critique appears to confuse the relationship of choice and process on the one hand, and the role and function of reciprocal tolerances on the other. In effect, Professor Rosenberg seems to pose a false, or at best, artificial dilemma between the notions of "perfect justice" and reciprocal tolerances. Rosenberg requires that "perfect justice" (as he sees it) should be sacrificed at the altar of the smooth running of the federal system. The Rosenberg position is as follows:

[A] choice-of-law rule need not achieve perfect justice every time it is invoked in order to be preferable to the no-rule approach. The idea that judges can be turned loose in the three-dimensional chess games we have made of these cases, and can be told to do hand-tailored justice, case by case, free from the constraints or guidelines of rules, is a vain and dangerous illusion. It tries to dispose of law's ancient dilemma—the one or the many?—by exhorting courts to think deeply and decide justly. It elevates local substantive law policies to complete dominance and shockingly neglects policies concerned with making the federal system function smoothly. Above all, the idea that we need only a method, not rules, overlooks the key point: the present concern [multistate highway accidents] is with high-volume problems in the administration of justice, not in its inspired divination.

Id. at 664.

Professor Weintraub's functional view has generated preferred rules for true conflicts in several specific areas of law,⁴⁷⁸ and Professor Cavers has explicitly provided principles of preference to guide choice in selected problem areas of the field.⁴⁷⁹ In addition, Professor Leflar has provided a distinctive, realist sense of the choice-of-law process by maintaining that a court applying the better rule is prescribing in ways consonant with community expectations.⁴⁸⁰ The most important point to note is that all of these writers, and others, have considered as a central task of modern PIL, that incomplete and ambiguous prescriptions need to be supplemented in order to make the choice-of-law process more reasonable and, thereby, to not only reinforce standards of reasonableness, but to create them. It is here recommended that the prescriptions of PIL, with their gaps and ambiguities, be supplemented with more general basic community policies emerging from the top and established at the bottom. These policies should be developed with reference to emerging normative standards concerned with human rights and human dignity, and expectations implicit in the common core of legal phenomena that control and regulate the life of the individual in the community.

- e. Integrating expectations in particular prescriptions; supplementing incomplete prescriptions with more general community policies

The fundamental point to underscore is the creative challenge of decision. This challenge requires not only the recognition that responsibility for total policy in the community rests with decisionmakers, but also that basic civic responsibility requires that decisionmakers honor values implicit in the common core of legal culture, as well as emergent expectations about justice and human rights. There seems to be no reason why decisionmakers at the lowest rungs of the domestic ladder should not be influenced and conditioned, for example, by the imaginative distillation of the more general principles implicit in international *jus cogens*.

The above three principles underscore the importance of the academic contribution to PIL for it is in academia that "intellectual strategies and procedures" have been and are being invented to minimize the establishment of anachronistic law, of arbitrary law, and of unfair surprise. It is through the invention of such strategies and procedures

478. See, e.g., R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (2d ed. 1980).

479. See, e.g., D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965).

480. See, e.g., R. LEFLAR, AMERICAN CONFLICTS LAW (3d ed. 1977); Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10 (1977); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

that one might hope to guide decision-making wherein particulars and wholes are rationally connected in ways that consistently and consciously approximate the common interest in human dignity. To increase the emergence of a rational choice-of-law process, a procedure to guide choice in particular contexts is required.

The last of these strategies remains to be considered. Contemporary theorists have intuitively and sometimes explicitly used at least some of the principles recommended here, but their systematic conceptualization has not been apparent in the literature of PIL.

2. Principles of Content

A pervasive problem of choice-of-law has been the task of determining what principles of content are to form the rule of decision. The trends in modern decisions have often vacillated between reification and nihilism. The result has been the articulation of transstate rules incompatible with realism or the assertion of a no-rules formula equally incompatible with multi-state reality. The need to systematically articulate principles relating to the prescribing process is apparent.

a. Ascertaining prescription

Prescription is a communication process. To understand communication accurately and realistically, one must view the communication in context. It is particularly important that prescription viewed in context yield shared expectations about the reach of its content, the definition of its authority, and the framework of control. An important index of shared expectation is the measure of presumptive deference given to the communicator and target communicatees during the entire prescribing process. The particular challenge for decision is to ensure that these expectations are compatible with human rights and dignity.

b. Supplementing expectations

Prescriptions are never complete. They are even less complete in the international environment. Gaps, ambiguities and contradictions abound. Supplementation is intrinsic to prescription.

c. Integrating expectations

Integrating expectations is the craft skill that shapes the result and in many ways shapes consequences and expectations. Many conditions may influence the capacity of a decisionmaker to integrate expectations of prescription with postulated goals of human dignity. The

process is as unending as it is challenging.

3. Principles Relating to the Process of Claim

One of the most important functions that scholars can bring to bear on PIL is the process of claim-classification. The need to eschew broad classifications and the need to appreciate claims in fact as the predicate of classifications are vitally important if decision is to respond to claim in terms of realistic expectations.

4. Principles Relating to the Process of Decision

Again, the process of adjudication has not developed with clear-cut distinctions between different decision-making functions. It should be recognized that courts are not the only agencies charged with making and applying PIL. The need to articulate the functional categories of decision-making from invocation to termination can throw a particular light on many of the unique and obscure features of the PIL puzzle. It can also assure, in a more scientific way, that PIL decisions will aspire to rationality and that this rationality might consciously aspire to promote the common interest.

5. Principles of Procedure

a. The contextual principle

It is essential that claims, responses to claims, and decisional outcomes be viewed in context. In a field such as PIL, it can easily be shown that many contextual features of a problem subliminally define and condition outcomes. There can be no realistic and comprehensive theory about PIL without honoring the principle of contextuality.

b. The principle of economy

Temporal and material resources are a limiting factor upon the fullest appreciation of the contextual location of a problem. The principle of economy is simple: do as much as available resources allow.

c. The principle of provisional focus

This principle has represented difficult practical implementation under traditional PIL perspectives. In practice, cases have turned on what in traditional law is called characterization, a process that involves provisional classifications. These classifications have often been outcome determinative. The principle of provisional focus requires that one minimize *a priori* classification and focus more resolutely upon

claims in fact; a full range of provisional prescriptions must be brought to the attention of the decisionmaker before adverting to a premature conclusion.

d. The principle of clarified focus

This principle requires that the problem be placed in a larger context than that envisioned by the contestants themselves. The standpoint of the observer can be particularly useful in relating the problems and potential solutions to a prescribing mechanism that closely approximates the common interest.

e. The principle of observing trends in past experience

Past experience is a key index of community expectations and the success or failure of a community to honor or not honor those expectations in the process of its authoritative decisions. Often past experience will distill competing rules and perspectives that may be useful in framing current and future decisions that expedite community expectations.

f. The principle of realistic orientation to factors affecting decision

The conditions of decision-making are vital to understanding patterns of past and present decision-making. They are crucial to understanding the future. Practical lawyers have, for generations, understood the aphorism that "horsesense" is realism defined. What is meant, of course, is that any decisionmaker is, in some degree, influenced or conditioned by environmental and predispositional factors. These factors may be vital in understanding the differences between theory and practice, between the law in the books and the law in fact.

g. The principle of observing limits on future probabilities

The future is pregnant with alternatives. If a choice exists in realizing one option rather than another, some estimate of the costs and benefits of realizable options must be made. The standard of measurement inevitably must be the cost or benefit in terms of a gain or loss of community values as a whole.

h. The principle of inventing and evaluating alternatives

It is important, particularly in PIL, to assess what costs and impacts a variety of options might have on the social process viewed on a multi-state basis. Inventing and assessing alternative futures or options against fundamental community policies and promoting options that

closely approximate the common interests adds an important, creative dimension to the choice-of-law process.

F. Goals of PIL

(1) At the highest level of abstraction, the objective of PIL as an indispensable complement to those problem areas designated as public international law, is the realization of a global public order of human dignity where all values are optimally shaped and shared through the strategies of persuasion rather than coercion.

(2) At a more operational level, one may see the decision-making process as actively structuring the social process to achieve the objectives specified in (1) above. In other words, the process of authoritative decision uniquely geared to the PIL frame should consciously strive for the development of situational patterns geared to institutionalization, in global terms, of each goal value. These value-situations may be structured or patterned according to specialized arenas for the power process (*fora*); for the wealth process (markets); for the affection process (affection and friendship circles) and so forth. Value-situations may also be patterned with sufficient flexibility so as to respond, in varying degrees of inclusivity and exclusivity, and be reconcilable with the goals evidenced in the human dignity postulate.

(3) All allocations of competences in PIL (applicative and prescriptive; secondary and primary) should, so far as possible, be done to optimize preferred outcomes, viz., that advance the realization of a public order of human dignity.

(4) The allocation of decision-making competencies in PIL should be further conditioned by the realization that the promotion through decision, of common interests as distinct from special interests, approximates the accretion and diffusion of values having the widest relevance for a public order of human dignity.

G. Presumptive Preferences of a Theory about PIL

(1) For each specific claim in PIL, policy should be clarified so that, to the extent possible, primary inclusive competences of the international community might be postulated as a standard for the evaluation through time of the outcomes of all global allocations of competence. The reason for this is that the scholar might then be able to meaningfully recommend principles of content and principles of procedure whereby actual outcomes might more closely reflect the ideals implied in the primary inclusive competence to apply and prescribe policy.

(2) Deference should be given to an exclusive assertion of compe-

tence when it is observed that all major impacts of a potential decision are centered upon the group space of a particular body politic that asserts exclusive control over the claim precipitating events. The prescription and application of policy in terms of group space is not here viewed as being forever static. Rather, it is a product of the shared perspectives incorporated in processes of interaction at whatever level of inclusivity or exclusivity. "Spatial" delimitations are a product of social relations; they are understood to encapsulate the interpersonal structuring of space in a psycho-social sense in which various resources play an important role, one such important role being territory. Territory is sometimes symbolized as the basis of a social grouping; it occasionally recedes in symbolic significance so that it is merely an aspect of the group. The delimitation of a group's spatial parameters in PIL can be only meaningfully drawn by reference to relevant group expectations in the context of each specific problem involving the allocation of values and then tested against inclusive community policy and whatever peremptory norms are extant in the clarification of such policy.

(3) The third preference for PIL is that its policies facilitate the flow of people, goods, and services across state lines and accommodate the establishment of operative modalities to achieve this end; the group space demanded for the smooth operation of these modalities (associations, etc.) must be honored by all who wield formal and effective power to the extent that the recognition of transgroup voluntaristic "space" is consistent with inclusive community policy and peremptory norms of the global whole.

(4) All exclusive assertions of competence are not to be deferred to where tolerance of such a claim results in a violation of a peremptory inclusive international standard of conduct.

(5) While it is presumptively preferred that the application and diffusion of policies closely identified with inclusive prescription be made, due deference should also be accorded where exclusive minimum order interests of a substantially affected body politic are at issue. The elaborate taxonomy of policy developed by the policy science school provides the most sophisticated technique for making policy choices in a transgroup context.

(6) The final presumptive preference is for decisionmakers to recognize the creative element involved in making and applying policy. The creative element must be exploited for the advancement of the optimality principle concerning value accretion and diffusions in the PIL context.

